No. 896

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

VS.

HONOLULU PLANTATION COMPANY,
(A CORPORATION),
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII.

Brief of Defendant in Error.

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Counsel for Defendant in Error

Print of H. S. CROCKER CO. San Francisco

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STATEMENT.

The plaintiff in error is required under the rules of Court to make the statement of the case and the defendant in error is required to make no statement unless he controverts the statement made by plaintiff in error.

This defendant does not controvert the first paragraph of the statement made by plaintiff, but the rest is so much more in the nature of an argument upon the plaintiff's view of the evidence than a statement of the case,

and is so manifestly unfair and uncandid that the defendant does controvert it.

The proceeding was commenced on July 6, 1901, by the filing of a petition on the law side of the Court. The several defendants answered in due time and this defendant in its answer admitted substantially all of the allegations of the petition except that as to the value of the lands sought to be condemned as to which it alleged that it would be damaged in the sum of $200,000 by the taking of said premises by the petitioner, of which said sum it claimed $55,055 for money actually laid out and expended upon said tract, so sought to be condemned, within three years prior to the filing of the petition.

Upon the issue so framed a trial was had resulting in a verdict of $105,000. This verdict was unsatisfactory to both sides, to the plaintiff, because, when considered in connection with the judgment already rendered in the issue between it and the Estate of Bernice P. Bishop, deceased, it exceeded its appropriation; to the defendant, because it believed it did not have a fair and impartial trial.

Thereafter, on January 25, 1902, the court below in passing upon plaintiff's motion for a new trial granted the same unless the defendant would accept $75,000 as full compensation. This the defendant declined to do and a new trial was ordered.

On March 3, 1902, the second verdict was rendered, awarding the defendant $102,523. This verdict, as also the one rendered at the first trial, was returned upon a form given to the jury at the request of counsel for the government. (See Bill of Exceptions, Record 726.)

On May 13, 1902, the second motion for a new trial presented by plaintiff was denied, whereupon a bill of exceptions was prepared and sealed and this writ of error sued out.

Counsel for plaintiff in error, in his statement of the case says that " two theories as to value permeated this case ". Two *theories* as to the *law* did permeate the case and apparently two *opinions* also prevailed as to the value.

As to the theories of the law, *plaintiff* argued that nothing existing outside of the four corners of the particular portion of defendant's plantation which the government had marked off for its use could be shown, and, to a very great extent, the Court ruled with him,—so much so that all his requests for instructions were given, at least in substance. Defendant, on the other hand, believed that it was entitled to receive " just compensation " for its property just as it lay, and that to obtain this the actual situation and surroundings of the property ought to be shown; that the property ought not to be stripped of its natural environment and cut off from its advantageous position, but, taking into view all that defendant possessed to avail itself of the usefulness of its leasehold, the value ought to be estimated as though defendant were willing to sell but not obliged to, while the government was willing to buy, but did not have to take it.

(See defendant's requests to charge, Record 444-445.)

These requests were refused and the Court in most instances throughout the trial, as will appear from an

inspection of the transcript, ruled against the defendant. The few exceptions that crept in were mere incidents as compared with the general course of the trial and of the Court's rulings.

REFERENCE TO PLAINTIFF'S BRIEF.

Fifty-five pages of the brief of counsel for plaintiff in error are taken up with a discussion of the right of the Court to have called in a jury to pass on the question of the amount of compensation defendant was entitled to receive for the taking of its property. Much of that discussion is not and never has been in any way controverted here or elsewhere. We relied in the court below and we will rely here almost exclusively on decisions of the Supreme Court of the United States that are exceedingly close in point both on this and every other proposition connected with the case.

Now in the first place no objection was made and no exception was taken to the action of the Court in calling in a jury, and so far as the *record* (not the so-called "transcript of record", but the record in its technical sense) goes it appears that the plaintiff acquiesced in the trying of the issue in this case before a jury. The affidavit of Mr. Dunne we were not called upon to controvert. It has no place in the consideration of a question of this character. Such a procedure is wholly unauthorized and it must be wholly disregarded. Neither can the so-called "supplemental bill of exceptions" be considered at all. It has no standing. It was not sealed by the lower court. These propositions are so thoroughly established that

citation is quite unnecessary, but we may not improperly refer the Court to

Pomeroy's Lessees v. The State Bank of Indiana, 1 Wall., 592, 597-604.

Railroad Co. v. Trustees, 91 U. S., 130, 131.

Not only is the matter not properly before this Court, but it has been authoritatively decided upon the very statute that plaintiff is proceeding under that an ordinary jury at the bar of the Court is the only tribunal contemplated by Congress as the one to pass on the question. Not only this, but the decision so holding was rendered six years before Congress passed the act authorizing the Secretary of the Navy to proceed to acquire these lands at Pearl Harbor for a naval station under said act.

Chappel v. United States, 160 U. S., 499-513.

This, however, is not all. While, under the Hawaiian Statute to which counsel for plaintiff makes reference it is provided that *conflicting claims* to the *property* and the *compensation* shall be determined by the Court, and while, as counsel for plaintiff says, the act *itself* is silent concerning the use of a jury (plaintiff's brief, 106) it does provide in its last section that "where not otherwise ex- "pressly provided the procedure shall be the same as in "other civil actions."

Now the chapter on "civil procedure in courts of record" provides that civil actions shall be commenced by filing a sworn petition.

Ballou's Civil Laws, Sec. 1215, page 483.

Compiled Laws Sec. 1099 page 320

Section 1223, page 486, provides for the appearance of defendant and prescribes two forms of answer, one

Compiled Laws Sec 1106

admitting all of the allegations of the petition which shall "form an *issue of law* to be determined by the Court", the other, denying all the allegations of the petition which shall "form an *issue of fact* to be determined by the jury."

No other or further pleading is required or allowed.

This chapter on Eminent Domain having prescribed that the procedure where "not otherwise expressly provided", should be the same as in other civil actions and there being no provision, as is conceeded, either way as to how the amount of (not the title to) the compensation shall be ascertained, of course it follows by a more certain process of reasoning even than that used by Mr. Justice Gray in the Chappel case that the only trial required or contemplated by the act was by an ordinary jury at the bar of the court.

Counsel for plaintiff has rested his argument upon the section providing that "the court shall determine all "*adverse* or *conflicting claims* to the *property sought to be* "*condemned* or *damages to be awarded* for the taking of the "same." In the first place it need only be said that there were here no "adverse or conflicting claims" either to the property or to the compensation to be awarded. In this counsel for plaintiff fully concurs. His way of putting it is as follows: "But in this case, however, there "are no adverse or conflicting claims, either to the prop- "erty or compensation".

Brief of plaintiff in error, 78.

The *determination* of "conflicting claims" to compensation is one thing; the award of the compensation itself is quite another. One is the logical province of the Court;

the other, the logical province of the jury. There being no "conflicting claims" and the jury having awarded the compensation and the trial court in its discretion having refused to disturb their award the government has no just cause of complaint.

Plaintiff cites certain Hawaiian decisions as being in point, but they are not. The act in question has not been construed by the local court, but was taken with some modifications, notably that of leaving out the scheme of ascertaining compensation by arbitrators, from an old New Zealand statute.

This proposition is discussed further by us under the so-called assignment 48 *infra*.

PLAINTIFF'S FIRST GROUP OF ALLEGED ERRORS.

Twenty-one pages (119 to 140) of the brief are devoted to a discussion of assignments of error numbers 1, 3, 4, 7, 8, 9, 10, 13, 22, 25, 33. They are referred to as a "group" or "class" of exceptions. We have discussed each separately later on in this brief, and they will be readily found from the top-line index, but the cases relied on by us are nearly all cited under "assignment No. 1."

Counsel for plaintiff does not discuss the *assignments of error* made by him. He discusses the *language* used by him in making objections, and cites cases to show that the *objections* stated were in proper cases fatal objections.

We do not controvert his authorities. We do not deny that in proper cases the *rules of evidence and of law* discussed by him would have necessitated a new trial had they been violated. What we strenuously maintain is that there were no rulings made by the Court that were obnoxious to any of those rules. And we ask the Court to look into the *record* (the bill of exceptions) and consider the objections in the light of the questions asked and the situation surrounding them. We refer to the several pages of the record where such rulings will be found in our discussion of each of the assignments of error.

We have discussed each of the assignments of error *seriatim*, and will refer the Court to that discussion without repeating it here. We merely say that tested by the decisions of the Supreme Court that are in point there is no error in the record.

See Boom Co. v. Patterson, Infra pages 20-21.
Monongahela Nav. Co. v. U. S., Infra pages 24-32.
Gettysburg Ry. v. United States, Infra page 24.
Chicago Ry. v. Chicago, Infra page 104.
Montana Ry. Co. v. Warren, Infra pages 73-76.

PLAINTIFF'S DISCUSSION OF ASSIGNMENTS 5, 17, 18 and 24.

(Plaintiff's Brief, 140-146.)

These objections went only to the *form* of certain questions asked during the progress of the trial. Each was addressed to the discretion of the Court, and there could manifestly be no error in the ruling.

Each of the assignments is hereafter discussed under its appropriate heading.

PLAINTIFF'S DISCUSSION OF ASSIGNMENTS 11, 19, 20, 21, 23, 36.

(Plaintiff's Brief, 146-166.)

These several assignments may be discussed so much more clearly *seriatim* that we are disposed to simply refer to the discussion found further over in this brief and pass on to the next group. But we will say only this. "Market value" *was* made the test of the compensation that defendant was to receive, and the jury were so instructed. (Record 459.) Although we earnestly urged and still believe that in this particular case, where the government was taking a *portion* only of our arable land, it was no proper test. (See Record, pages 443, 448.)

"Market value" as a test of compensation is *generally* the most satisfactory means of arriving at the amount of the defendant's damage, but in a case like this, where the particular tract taken is a part of one whole plantation, upon another part of which the defendant has spent more than two million dollars (as appears by the record from plaintiff's own proof, Record 613) in building a mill, erecting extensive irrigating plants, purchasing railroads and other equipment and raising seed cane, to segregate the portion wanted and then insist that the defendant is entitled to no more than it would bring at "a fair public sale" (Record 717), as if there were no plantation there, is so glaringly unfair that in the language of Mr. Justice Brewer in the Monongahela Case "reasoning that would

"lead to such a result must have some vice, at least the "vice of injustice."

But the Courts that do rigidly adhere to "market value" really give the defendant the benefit of the value to it, after all, for they say that the defendant is entitled to the value to *any one*, and of course that includes the value to the defendant:

See Ry. v. R. R., 100 Ill., 21-33; 112 Ill., 590, 605-7; also infra pages 56-61.

Counsel for plaintiff among other cases quotes a Minnesota case on page 159 of his brief, in which it is said that where a *railroad* is *taking* land it would be wrong to put to a jury the question of what it would be worth "to such railroad"—that is as though we had sought to prove what this land was going to be worth to the government as a test of our compensation. Nothing of the kind occurred at the trial in any shape or form.

The case from Wendell is not at all in point (page 163). In that case the one whose property was taken wanted to get his *price* before his property could be taken, not its *value* to him, but what he deemed he ought to have for it. Nor is there anything for us to take issue with in the other cases cited. Pennsylvania expressly recognizes that there are cases where market value is not a proper test and the Monongahela case quotes at length from one of them.

There was no claim that this property had added value because of anything *peculiar* to the particular owner. It was only that it had added value in view of the *exact situation and surroundings* of the *tract itself* that

we maintained that it had added value, not because the Honolulu Plantation Company, with a capital of $5,000,000, if you please, owned it!

But, as we have already stated, this discussion is best considered in the light of the *record* and the actual rulings made rather than as an abstract proposition, and so we will refer to the subsequent discussion where each assignment is considered under its appropriate number. It will be found that by so examining them that there were no rulings of which the government has any just cause of complaint.

Before leaving this, we wish to call attention to the fact that the portion of a question about "the whole property of the plantation" etc., quoted on page 150 of plaintiff's brief, was stricken out before the question was answered by the witness. (Record 590.)

ASSIGNMENTS 14 and 15, and 26 to 34.

(Plaintiff's Brief, 166-184.)

These ought to be considered together. The first ralate to the testimony of a surveyor, a young man of limited experience who expressly testified that he did not consider that he had any knowledge of values of real estate and leaseholds in or about Pearl Harbor and that vicinity. (Record 597.) The Court held that, in view of this, his opinion as to the value of such a leasehold ought not to be taken, and in that there could certainly be no abuse of discretion.

As to the other rulings, they were made allowing sugar men of great experience and entire familiarity with the kind of leasehold interest whose value was in issue, and

having also a good understanding of the locality as also of the exact portion of land taken by the government, to testify as to their opinion of its market value.

An examination of the qualifications of each of these witnesses as set out in the record will show that there was no abuse of discretion on the part of the Court in permitting them to so testify.

See discussion under each of said assignments.

See also Montana R. R. v. Warren, 137 U. S., 348.

The case of N. Y. Mfg. Co. v. Fraser, 130 U. S., 611, (Plaintiff's Brief 183-184) is not in point There, a witness having knowledge only of gold mills but no knowledge of silver mills was not allowed to testify on an issue of loss of rental value of a silver mill, and the Court held that there was no abuse of discretion. His case was like Thrum's, not like that of Goodale and the other plantation men.

ASSIGNMENT 16.

(Plaintiff's Brief, 167-172.)

Counsel has left out in his discussion of this assignment of error the whole point of the matter.

McCandless was not asked the question asked of him on cross-examination because he testified that this particular leasehold interest was worth only $15 to $20 per acre, but because he said, against the strenuous objection of defendant (Record 231), that he so testified *because* he was a director in the Oahu Sugar Company and because *that company* about a year and a half or two years ago secured a lease of Ford Island from the Ii Estate for

twelve dollars and a half an acre per annum and that the *Oahu Sugar Company* considered when they leased that land that they had given every cent that it was worth *to the Oahu Sugar Company.*

Now then what was that testimony given for? Manifestly the witness meant to convey the impression that because the Oahu Sugar Company at that time paid twelve and one-half dollars per acre for their lease and considered that they had paid every cent that it was worth to them, therefore the lease in issue was, to use his own language, "worth no more to the company (the defendant) than they have to pay for it", (Record 620). Well now it transpired that the Oahu Sugar Company claimed $200,000 as the value of a portion of that same leasehold that, to use his own language, he "had been testifying about". (Record 622.)

Mr. McCandless, having been permitted to give his reason for placing no value on the leasehold in question, and his reason being that, because a company of which he was an officer considered its leasehold of no value, therefore ours was likewise of no value, the Court certainly did not err in permitting us to show by the witness's own mouth that he was mistaken as to his understanding of the opinion of his company concerning the value of their lease. The original inquiry was clearly irrelevant, prejudicial and damaging to the defendant and to have also held that the defendant was to be estopped from going into the truth of the testimony on cross-examination would have been the very essence of injustice.

THE VERDICT, MOTION FOR A NEW TRIAL AND JUDGMENT.

(Plaintiff's brief, 184-211.)

These assignments cannot be considered. That proposition is thoroughly established.

See Chicago R. R. v. Chicago, 166 U. S., 226, 242-246 (a condemnation suit) and cases cited.

Pomeroy's Lessees v. State Bank, 1 Wall., 592, 587-604.

There is no foundation in fact for the claim that Judge Estee did not exercise his discretion in passing on the second motion for a new trial. Counsel admits that the Judge's attention was specifically called to the point of the exception. (Brief, 197-198.)

Judge Estee states in his opinion on the second motion that it is well settled that he *can* again set aside the verdict *if* in his discretion he sees fit to do so, yet there being no questions of law involved, he *will* not. For a full discussion of the matter see assignment number 48, *infra*.

Having considered all the points made by the plaintiff's counsel in his brief we will now refer *seriatum* to the several assignments of error.

ASSIGNMENT NUMBER 1.

(Assignment of Errors, Record 816. Bill of Exceptions, Record 546.)

Assignment number one is based upon an exception taken to the overruling of a certain objection to the following question, "Now, do you know whether there is "any mill belonging to the plantation a mile below this "land?", which said question was objected to by plaintiff in error, upon the grounds that it was not proper cross-examination, and was going into some other land outside of the land sought to be condemned; the answer of the witness was, "I know of the Honolulu Plantation's Mill."

The rules of this Court require that each assignment of error shall quote the full substance of the evidence admitted or rejected, and the above question and answer, together with the objection, ruling and exception, are set forth in the assignment of errors as the full substance of such evidence.

It would seem on the face of it that there would be nothing prejudicial in the ruling and testimony set out, but as this assignment is similar in principle to a number of others, we will go into it more fully than we would otherwise deem necessary.

The objection seems to have been based upon the proposition that there was no logical connection between the question asked on cross-examination and the witness's testimony on the direct. On the direct he said there was no mill on the land sought to be condemned.

The objection also seems to be based upon a belief that under no circumstances could any existing fact or cir-

cumstance outside of the exact boundaries of the particular portion of land sought to be condemned, be shown.

It is alleged by the plaintiff in error in its petition by which the proceedings were commenced that the lands covered by the lease to the Honolulu Plantation Company " include only a part of an entire tract or parcel " of land.

See paragraph three of Petition, page 9 of Record.

On his direct examination this witness, as shown by the bill of exceptions, which has become a part of the record from the Court below, testified that he knew the properties that were involved in the case. (Record, page 539.)

In the course of certain visits he said he had examined the land and to make such examination was the only purpose for which he went there. (Record, page 539.)

The witness further testified that limiting his attention strictly to the land described by him there was not upon it any mill for the crushing or otherwise handling of cane or any other agricultural product. (Record, page 541.)

Now, as is shown by the evidence, there was a large mill belonging to the defendant company, standing on its adjoining plantation lands, which mill was constructed and in existence on the day upon which the proceedings for the condemnation of the portion sought for were commenced, to-wit, July 6, 1901. (Record, 547.) The witness, on his direct, had been asked if there was any mill on the particular portion of the defendant's plantation sought by the government manifestly for the purpose of showing that there was no mill there, and thus producing an impression in the minds of the jury that the lands were of less value for sugar-growing purposes

than they would have been if the defendant had had a mill there with which to grind the cane grown thereon.

Was there not, then, a logical connection between the question asked upon cross-examination and that asked on the direct? Certainly it would seem as though the question was entirely proper unless the defendant could not be permitted to show the existence of a mill adapted to and capable of grinding the cane to be produced on the portion of its land that the government was seeking to take away from it.

Is it the law, that in ascertaining what shall be the defendant's "just compensation", one whose property is about to be taken from him by the strong hand of the Government shall be deprived of the right to show the elements of the value that that property contains? If one of the elements of value happens to consist of an advantageous situation with relation to an adjacent mill, shall he be deprived of the right to show that circumstance? A city lot may be of more value because it is surrounded by improved property, because a multitude of persons live in the immediate vicinity and pass the lot, because of other facts and circumstances lying wholly without the boundary lines of the particular parcel of land,—shall the owner be deprived of the right to show the situation of his property? A quartz ledge may be of greater value because there is a mill near by; an iron mine may be worth more because there is a railroad connecting it with a smeltery; a piece of timber land may be of greater value because of the existence of an adjacent saw-mill. Are the respective owners to be deprived of the right of showing these facts when an inquiry is being made as to what

shall constitute just compensation for the taking of such property?

It may not be out of place to cite the authorities at some length right here, for these questions will recur on considering subsequent assignments of error, a number of which raise practically the same general question. Plaintiff's counsel claimed that the inquiry should be confined rigidly to the four corners of the particular portion of the defendant's plantation it was taking. The Court, though ruling always strongly in plaintiff's favor, nevertheless did permit defendant, to a very limited extent, to show some few facts and circumstances pertaining to the immediate surroundings of the land condemned. The limited extent to which this was done will more fully appear as plaintiff's several assignments of error are considered.

"Just compensation" is defined in Alloway v. Nashville, 88 Tennessee, 510, 8 L. R. A., 123, 125, as follows:

"The 'just compensation' required by our constitu-
"tion is the fair cash value of the land taken for public
"use, estimated as if the owner were willing to sell, and
"the corporation desired to buy, that particular quantity
"at that place and in that form." Citing authorities.

"It includes every element of usefulness and advan-
"tage in the property. If it be useful for agriculture or
"for resident purposes; if it has adaptability for a reser-
"voir site, or for the operation of machinery; if it con-
"tains a quarry of stone, or a mine of precious metals; if
"it possesses advantage of location or availability for
"any useful purpose whatever,—all these belong to the
"owner, and are to be considered in estimating its value.

"It matters not that the owner uses the property for the "least valuable of all the ends to which it is adapted, or "that he puts it to no profitable use at all. All its capa- "bilities are his, and must be taken into the estimate."

The questions calling for opinions in that case were generally in this form: "Considering the property sought "to be condemned in the form it was taken, and as it was "taken, and having regard to the entire property, and the "uses to which it was put, and also the uses to which it "was adapted, and assuming that Mr. Alloway wanted to "sell, but was not obliged to sell, this piece or parcel of "land, and the city wanted to buy it, but was not obliged "to have it, what was the cash market value of the said "property in August, 1887, and what would be just com- "pensation to Mr. Alloway, and what damages should be "allowed him?" Some of the witnesses, especially those put upon the stand by the owners, answered the question as to their acquaintance with the property and its market value.

See also 2 Lewis Em. Dom., 2d Ed., 1051-1055, 1081 and 1113.

The following are quotations from the above:

"All the facts as to the condition of the property and "its surroundings, its improvements and capabilities, may "be shown and considered in estimating its value. Of "course circumstances and conditions tending to depre- "ciate the property are as competent as those which are "favorable. Facts affecting the value of the property "may be shown though they have become known since "the taking or since the commencement of proceedings.

" Where land was available for both mining and town lot " purposes, it was held error to compel the owner to elect " whether he would prove its value for one or the other. " If property has no market value, then it is a question " of real or actual value, and every fact bearing upon such " value may be shown, and those acquainted with the " property, and its surroundings may give their opinion of " its value, though not experts in the strict sense"

" §479. Value for Particular Uses.—The market value " of property includes its value for any use to which it " may be put. If, by reason of its surroundings, or its nat- " ural advantages, or its artificial improvements, or its " intrinsic character, it is peculiarly adapted to some par- " ticular use, all the circumstances which make up this " adaptability may be shown and the fact of such adapta- " tion may be taken into consideration in estimating the " compensation."

2 Lewis Em. Dom., 2d Ed., pages 1051, 1052.

" Whatever in its location, surroundings and appur- " tenances contributed to the availability of the land for " valuable uses, was proper evidence to be considered by " the jury in estimating its salable character, and ascer- " taining its market value."

Note 43, 2 Lewis Em. Dom., page 1051.

Quoting from Boom Co. v. Patterson, 98 U. S., 403:

" ' In determining the value of land appropriated for " ' public purposes, the same considerations are to be re- " ' garded, as in the sale of property between private par- " ' ties. The inquiry in such cases must be, what is the " ' property worth in the market, viewed not merely with

"'reference to the uses to which it is at the time applied,
"'but with reference to the uses to which it is plainly
"'adapted; that is to say, what is it worth from its avail-
"'ability for valuable uses. Property is not to be deemed
"'worthless because the owner allows it to go to waste,
"'or to be regarded as valueless because he is unable to
"'put it to any use. Others may be able to use it, and
"'make it subserve the necessities or conveniences of
"'life. Its capability of being made thus available gives
"'it a market value which can be readily estimated.

"'So many and varied are the circumstances to be
"'taken into account in determining the value of prop-
"'erty condemned for public purposes, that it is perhaps
"'impossible to formulate a rule to govern its appraise-
"'ment in all cases. Exceptional circumstances will
"'modify the most carefully guarded rule; but, as a gen-
"'eral thing, we should say that the compensation to the
"'owner is to be estimated by reference to the uses for
"'which the property is suitable, having regard to the
"'existing business or wants of the community or such
"'as may be reasonably expected in the immediate fu-
"'ture.'"

2 Lewis Em. Dom., 2d Ed., page 1053.

The author also quotes the following from King v. M. U. Ry. Co., 32 Minn., 225:

"'The evidence minutely described the situation of the
"'premises, the size of the buildings, the nature and
"'character of the machinery, and the uses to which it
"'was adapted. Witnesses were also called to prove the
"'value of the respondent's leasehold interest, including

"'the buildings and machinery. While the exceptions "'to the admission of evidence as well as to the charge "'of the Court vary somewhat in form, and present the "'matter in different shapes, yet the general question "'raised by all of them really is whether it was proper, "'in determining the value of this property, to take into "'account the fact that there was a manufacturing busi- "'ness established and in operation upon the premises. "'That this was allowed is really the alleged error here "'urged, and which we have to consider. We think it "'may be stated as elementary that a person is entitled "'to the fair value of his property for any use *to which* "'*it is adapted*, and *for which it is available*, and *for which* "'*it may be sold.* He is entitled to the value of his prop- "'erty for any use to which it may be applied, and for "'which it would ordinarily sell in the market, whether "'that use be the one to which it is presently applied, or "'some other to which it is adapted. It is, we think, "'equally true that any evidence is competent and any "'fact is proper to be considered which legitimately bears "'upon the question of the marketable value of the prop- "'erty. In this case evidence was introduced tending "'to prove that the fact of a business having been "'established and carried on on the premises for so long "'a time, materially increased the market value of this "'property. If this was the fact, it was competent to "'prove it; and, if proved, we cannot see why it was not "'proper to take it into consideration in estimating the "'value. Who can say that this circumstance would not "'affect its value; that is what a purchaser would ordi- "'narily be willing to pay? When we speak of the

"'*market value* of property as being what purchasers gen-
"'erally would pay for it, we do not mean what men
"'would pay who had no particular object in view in
"'purchasing, and no definite plan as to the use to which
"'to put it. The owner has a right to its value for the
"'use for which it would bring the most in the market.
"'This property was expressly built for a plow factory,
"'and was especially suited for such a use. And it is not
"'unreasonable to suppose that a purchaser would give
"'more for it than he would if the business had been sus-
"'pended for a time or had never been established there.
"'Take, for example, a hotel built expressly as a public
"'house, and not capable for advantageous use for any-
"'thing else; might it not be worth more, that is, bring
"'more in the market by reason of the fact that it had
"'been for years run as a hotel? So with a stand long
"'used for some branch of mercantile business. From
"'that very fact it might be worth more for that kind of
"'business than any other, and a man who wishes to buy
"'might give more for it than he otherwise would. If
"'so, why is not that a proper element to take into ac-
"'count in determining its value? To do so, is not as
"'counsel seems to argue, to pay the owner for his loss of
"'business or loss of future profits, but simply to give
"'him the marketable value of his property for the use
"'for which it is best adapted, and for which it would
"'bring the most.'"

2 Lewis Em. Dom., 2d Ed., pages 1081-1082, quoting from King v. Minneapolis Union Railway Co., 32 Minn. 224, 225-6.

The Supreme Court of the United States has also considered this question of compensation. The leading cases are Boom Co. v. Patterson, *supra*, and Monongahela Navigation Co. v. United States, *infra*.

The following is quoted from United States v. Gettysburg Elect. R'y., 160 U. S., 685:

"As to the *effect* of the taking upon the land *remaining*, " that is more a question of the *amount of compensation*. " If the part taken by the Government is essential to en- " able the railroad corporation to perform its functions, " or if the value of the remaining property is impaired, " such facts might enter into the question of the amount " of the compensation to be awarded. Monongahela Nav. " Co. v. United States, 148 U. S. 312, 333, 334."

In Monongahela Nav. Co. v. United States, *supra*, the following language is used at page 324:

" The question presented is not whether the United " States has the power to condemn and appropriate this " property of the Monongahela Company, for that is con- " ceded, but how much it must pay as compensation " therefor. Obviously, this question, as all others which " run along the line of the extent of the protection the " individual has under the constitution against the de- " mands of the government, is of importance; for in any " society the fullness and sufficiency of the securities " which surround the individual in the use and enjoy- " ment of his property constitute one of the most certain " tests of the character and value of the government. " The first ten amendments to the Constitution, adopted " as they were soon after the adoption of the Constitu- " tion, are in the nature of a bill of rights, and were

"adopted in order to quiet the apprehensions of many, "that without some such declaration of rights the gov- "ernment would assume, and might be held to possess, "the power to trespass upon those rights of persons and "property which by the Declaration of Independence "were affirmed to be unalienable rights.

"In the case of Sinnickson v. Johnson, 17 N. J. L. (2 "Harr.) 129, 145, cited in the case of Pumpelly v. Green "Bay Company, 13 Wall. 166, 178, it was said that 'this "'power to take private property reaches back of all con- "'stitutional provisions; and it seems to have been con- "'siderd a settled principle of universal law that the "'right to compensation is an incident to the exercise of "'that power; that the one is so inseparably connected "'with the other, that they may be said to exist not as "'separate and distinct principles, but as parts of one "'and the same principle.' And in Gardner v. New- "burgh, 2 Johns. Ch., 162, Chancellor Kent affirmed sub- "stantially the same doctrine. And in this there is a "natural equity which commends it to every one. It in no "wise detracts from the power of the public to take "whatever may be necessary for its uses; while on the "other hand, it prevents the public from loading upon one "individual more than his just share of the burdens of "government, and says that when he surrenders to the "public something more and different from that which "is exacted from other members of the public, a full "and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, "nor is it necessary to look through the Constitution to "the affirmations lying behind it in the Declaration of

"Independence, for, in this Fifth Amendment, there is "stated the exact limitation on the power of the gov- "ernment to take private property for public uses. And "with respect to constitutional provisions of this nature, "it was well said by Mr. Justice Bradley, speaking for "the court, in Boyd v. The United States, 116 U. S., 616, "635: 'Illegitimate and unconstitutional practices get "'their first footing in that way, namely, by silent "'aproaches and slight deviations from legal modes of "'procedure. This can only be obviated by adhering to "'the rule that constitutional provisions for the security "'of person and property should be liberally construed. "'A close and literal construction deprives them of half "'their efficacy, and leads to gradual depreciation of the "'right, as if it consisted more in sound than in sub- "'stance. It is the duty of courts to be watchful for the "'constitutional rights of the citizen, and against any "'stealthy encroachments thereon. Their motto should "'be *obsta principiis*.'

"The language used in the Fifth Amendment in re- "spect to this matter is happily chosen. The entire "amendment is a series of negations, denials of right or "power in the government, the last, the one in point "here, being, 'Nor shall private property be taken for "'public use without just compensation.' The noun "'compensation' standing by itself, carries the idea of "'an equivalent. Thus we speak of damages by way of "compensation or compensatory damages, as distin- "guished from punitive or exemplary damages, the for- "mer being the equivalent for the injury done, and the "latter imposed by way of punishment. So that if the

"adjective 'just' had been omitted, and the provision "was simply that property should not be taken without "compensation the natural import of the language would "be that the compensation should be the equivalent of "the property. And this is made emphatic by the adjec- "tive 'just.' There can, in view of the combination of "these two words, be no doubt that the compensation "must be *a full and perfect equivalent* for the property "taken. And this just compensation, it will be noticed, "is for the property and not to the owner. Every other "clause in this Fifth Amendment is personal. 'No per- "'son shall be held to answer for a capital, or otherwise "'infamous crime,' etc. Instead of continuing that form "of statement, and saying that no person shall be de- "prived of his property without just compensation, the "personal element is left out, and the 'just compensation' "is to be a full equivalent for the property taken. This "excludes the taking into account, as an element in the "compensation, any supposed benefit that the owner "may receive in common with all from the public uses to "which his private property is appropriated, and leaves "it, to stand as a declaration, that *no private property "shall be appropriated to public uses unless a full and exact "equivalent for it be returned to the owner.*"

And on page 328 the following language is used:

"How shall just compensation for this lock and dam "be determined? What does the full equivalent there- "for demand? The value of property, generally speaking, "is determined by its productiveness—the profits which "its use brings to the owner. Various elements enter "into this matter of value. Among them we may notice

"these: Natural richness of the soil as between two "neighboring tracts—one may be fertile, the other bar- "ren; the one so situated as to be susceptible of easy use, "the other requiring much labor and large expense to "make its fertility available. Neighborhood to the cen- "ters of business and population largely affects values. "For that property which is near the center of a large "city may command high rent, while property of the "same character, remote therefrom, is wanted by but "few, and commands but a small rental. Demand for "the use is another factor. The commerce on the Monon- "gahela River, as appears from the testimony offered, is "great; the demand for the use of this lock and dam con- "stant. A precisely similar property, in a stream where "commerce is light, would naturally be of less value, "for the demand for the use would be less. The value "therefor is not determined by the mere cost of con- "struction, but more by what the completed structure "brings in the way of earnings to its owner. For each "separate use of one's property by others the owner is "entitled to a reasonable compensation; and the num- "ber and amount of such uses determine the produc- "tiveness and the earnings of the property, and, there- "fore, largely its value. So that if this property, belong- "ing to the Monongahela Company, is rightfully where it "is, the company may justly demand from every one "making use of it a compensation; and to take that prop- "erty from it deprives it of the aggregate amount of "such compensation which otherwise it would continue "to receive. What amount of compensation for each sep- "arate use of any particular property may be charged

" is sometimes fixed by the statute which gives authority
" for the creation of the property; sometimes determined
" by what it is reasonably worth; and sometimes, if it is
" purely private property, devoted only to private uses,
" the matter rests arbitrarily with the will of the owner.
" In this case, it being property devoted to a public use,
" the amount of compensation was subject to the deter-
" mination of the State of Pennsylvania, the State which
" authorized the creation of the property. The prices
" which may be exacted under this legislative grant of
" authority are the tolls, and these tolls, in the nature of
" the case, must enter into and largely determine the
" matter of value. In the case of Montgomery County v.
" Bridge Company, 110 Penn. St., 54, 58, in which the
" condemnation of a bridge belonging to the bridge com-
" pany was sought, the court said: ' The bridge structure,
" ' the stone, iron and wood, was but a portion of
" ' the property owned by the bridge company and taken
" ' by the county. There were the franchises of the com-
" ' pany, including the right to take toll, and these were
" ' as effectually taken as was the bridge itself. Hence,
" ' to measure the damages by the mere cost of building
" ' the bridge would be to deprive the company of any com-
" ' pensation for the destruction of its franchises. The
" ' latter can no more be taken without compensation
" ' than can its tangible corporeal property. Their value
" ' necessarily depends upon their productiveness. If
" ' they yield no money in return over expenditures, they
" ' would possess little, if any, present value. If, how-
" ' ever, they yield a revenue over and above expenses,
" ' they possess a present value, the amount of which de-

"'pends, in a measure, upon the excess of revenue.
"'Hence it is manifest that the income from the bridge
"'was a necessary and proper subject of inquiry before
"'the jury.'

"So, before this property can be taken away from its "owners the whole value must be paid; and that value "depends largely upon the productiveness of the prop- "erty, the franchise to take tolls."

And at page 337 the following language is used:

"Whatever be the true value of that which it takes "from the individual owner must be paid to him before "it can be said that just compensation for the property "has been made. And that which is true in respect to a "condemnation of property for a post-office is equally "true when condemnation is sought for the purpose of "improving a natural highway. Suppose, in the im- "provement of a navigable stream, it was deemed essen- "tial to construct a canal with locks, in order to pass "around rapids or falls. Of the power of Congress to "condemn whatever land may be necessary for such "canal, there can be no question; and of the equal neces- "sity of paying full compensation for all private prop- "erty taken there can be as little doubt. If a man's "house must be taken, that must be paid for; and, if the "property is held and improved under a franchise from "the State, with power to take tolls, that franchise must "be paid for, because it is a substantial element in the "value of the property taken. So, coming to the case be- "fore us, while the power of Congress to take this prop- "erty is unquestionable, yet the power to take is subject "to the constitutional limitation of just compensation.

"It should be noticed that here there is unquestionably "a taking of the property, and not a mere destruction. It "is not a case in which the government requires the re- "moval of an obstruction. What differences would exist "between the two cases, if any, it is unnecessary here to "inquire. All that we need consider is the measure of "compensation when the government in the exercise of "its sovereign power, takes the property.

"And here it may be noticed that, after taking this "property, the government will have the right to exact "the same tolls the navigation company has been receiv- "ing. It would seem strange that, if by asserting its "right to take the property, the government could strip "it largely of its value, destroying all that value which "comes from the receipt of tolls, and, having taken the "property at this reduced valuation, immediately pos- "sess and enjoy all the profits from the collection of the "same tolls. In other words, by the contention this ele- "ment of value exists before and after the taking, and "disappears only during the very moment and process of "taking. Surely, reasoning which leads to such a result "must have some vice, at least the vice of injustice."

See also page 343, where, in speaking of value of franchises the Court uses the following language:

"But this franchise goes with the property; and the "navigation company, which owned it, is deprived of it. "The government takes it away from the company, what- "ever use it may make of it, and *the question of just com- "pensation is not determined by the value to the gov- "ernment which takes, but the value to the individual "from whom the property is taken;* and when by the tak-

"ing of the tangible property the owner is actually de-
"prived of the franchise to collect tolls, just compensa-
"tion requires payment, not merely of the value of the
"tangible property itself, but also of that of the fran-
"chise of which he is deprived."

Tested by these authorities can it be said that there is any error in the ruling of the Court allowing this defendant on cross-examination to show the existence of a mill on the tract of land of which this was a part? Even if the defendant had not been the owner of the mill, if it had been on the adjacent property of a stranger, it would have given value to the piece of land sought to be condemned. If that portion of its land were to be sold at auction, it would bring more by reason of the neighboring mill, because the purchaser in estimating the value of that piece of land would take into consideration the existence of the mill. The mill as shown by the evidence (Record, page 547) is a large one and is necessary to the profitable use of the lands sought to be condemned for the purpose of raising sugar cane which is the most valuable use to which the lands could be put.

Without further elaboration we submit that there is no error in the ruling complained of.

ASSIGNMENTS NUMBERED 2, 3 AND 4.

(Assignment of Errors, Record 817.)

These assignments of errors are upon all fours with assignment number one, the first or number two relates to the exception taken to the ruling upon an objection practically identical with that just considered, made to

the following question: "And that it stands now where "it stood on the 6th day of July, 1901?" The witness, after objection, ruling and exception, answered: "Yes sir." (Bill of Exceptions, Record 547.)

Assignment number three relates to the exception taken to the ruling upon an objection also practically identical with that set out in number one, made to the following question: "What was the size, Captain, of that mill?" The witness, after objection, ruling and exception, answered, "It is a large mill."

(Assignment of Errors, Record 817. Bill of Exceptions, Record 548.)

Assignment number four relates to an exception taken to a ruling upon an objection made to the following question: "How far is this Halawa Valley that you have "testified about in your first answer that I asked in re- "gard to it from the land in question—the nearest por- "tion of the land in question?" This question was objected to in the following language: "Mr. Dunne. 'I "'object to that on the ground that it is wholly imma- "'terial, and not proper cross-examination, and not "'addressed to any subject-matter to which the witness's "'attention was called on the examination in chief; and "'upon the additional ground that he might as well be "'asked how far Paris is from this piece of land.'" To which the Court ruled as follows: "The Court. 'That "'might be but the Court will allow him to answer how "'far Halawa Valley is from this land."'

(Assignment of Errors, Record 818. Bill of Exceptions, Record 548.)

The whole substance of the testimony given, as stated in the assignment of error, is as follows: "The witness. 'I

"'should say about a mile and one-half, or a mile and one-
"'quarter,—that is by the road. I do not know, only
"'approximately, over how much country down there
"'adjoining this land the Honolulu Plantation Com-
"'pany's property extends; approximately, I should say
"'that it extends over 5,000 or 6,000 acres, and includes
"'the land surrounding this land; I think Halawa Valley
"'is included in the Honolulu Plantation property; I
"'pass through it.'" It is hard to see how the testimony is in any way open to objection. Can it be that there was prejudicial error in permitting defendant to show how far away from this land "Halawa Valley," concerning which there was testimony in the record, was located. The objection was based upon the proposition heretofore stated, that the whole inquiry must be confined rigidly to the four corners of the particular piece of land that the government was taking away from the defendant and therefore that it was just as immaterial for the defendant to show the existence of a water supply owned by it and capable of being used for the irrigation of this portion of its land as it would be to show the existence of a water supply in the City of Paris existing there for the purpose of supplying the citizens of that metropolis with drinking water. We apprehend that the difference is marked. In one case the purchaser, in considering the value of this portion of land, which admittedly required water for the profitable growth of sugar-cane, would naturally ask where the water-supply was coming from. It would be among the first questions that an investor would put when making an inspection of the land with a view to purchasing defendant's leasehold interest. Upon

looking over the ground he would ask, "Where is your water supply, let us examine it?" and the representative of the defendant and the investor would then proceed to the Halawa Valley and inspect its water resources.

The witness had testified on direct examination that on July 6, 1901, there was no natural source of water supply on that land; and, as to an artificial source of water supply, there was only one small artesian well. (Record 541, 545.) The inference was sought to be given that there was no adequate available water-supply for use in connection with the land in question for purposes of irrigation.

We submit that on cross-examination it was proper to ask how far away an abundant supply of water was situated and that the answer shows no error prejudicial to the plaintiff in error.

ASSIGNMENT NUMBER 5.

(Assignment of Errors, Record 819. Bill of Exceptions, Record 575.)

This assignment stands on a different footing from the preceding one, but is equally lacking in any semblance of prejudicial error. The full substance of the proceedings as alleged by plaintiff in error in its assignment of errors is as follows:

"Q. 'Now Mr. Pratt how is this return made up; what "'kind of a return is that under the law?' Mr. Dunne. "'I object to that on the ground that it is a double ques- "'tion.' Mr. Silliman. 'I will divide it.' The Court. 'Let "'us hear what Mr. Pratt says.' Mr. Dunne. 'We ex- "'cept.' The witness. 'It is made under the head aggre-

"'gate value of plantations. It is under that head—a "'business for profit.'"

The Court in its discretion, perhaps to save time, directed the witness to answer the question as asked without waiting to have it divided, in this we cannot believe that plaintiff will seriously contend that there was prejudicial error especially in view of the fact that the witness was his own. It was a matter resting in the discretion of the Court and plaintiff in error could not have been prejudiced by the ruling.

ASSIGNMENT NUMBER 6.

(Assignment of Errors, Record 820. Bill of Exceptions, Record 585.)

Assignment number 6 is based upon an exception taken to the ruling of the Court upon an objection made to the following question, "Now Mr. Archer do you know what "that land is capable of yielding in sugar?" which question was asked by defendant upon cross-examination of a witness called by plaintiff for the purpose of proving the value of defendant's leasehold interest. The witness had testified on his direct to his opinion of the value of defendant's interest in answer to a hypothetical question put to him by counsel for plaintiff, in and by which he was told to take into consideration certain alleged facts, as for instance, the non-existence of a mill for the grinding of cane and the alleged want of an adequate source of water supply on the particular piece of land together with the alleged circumstance that no crop of cane had been produced upon the land, but that it might be used to raise cane just as it might be used to

raise any agricultural product. In connection with such assumed situation the witness had taken into consideration by instruction from counsel for plaintiff his own knowledge of the characteristics of the land, and thereupon under such assumed situation testified that a certain sum per acre would be the fair market value of the leasehold for the purchase of it outright. (Record 584.)

It appears, upon the Record (See pages 583-584), that the witness had assumed that the land might raise cane, and had also taken into consideration his knowledge of the land. In view of this testimony given upon the direct examination of this witness can it be said that there was anything illogical or improper or irrelevant in asking him upon cross-examination if he *knew* what the land was capable of yielding in sugar? It cannot be that this exception is seriously urged. The witness was called as an expert to testify to the value of defendant's leasehold interest the rent for which was payable in sugar, and based his knowledge of value upon what he believed the land would yield in sugar and a liberal latitude is always allowed in the cross-examination of such a witness.

If there were any doubt about it the witness's answer, which is set out in the Assignment of error, makes it perfectly clear that the question was one that he could answer and that it had a direct bearing upon the facts necessarily considered by him in forming an opinion as to the value of the leasehold interest. He testified that the land was good for cane, and where it was good would yield nine to ten tons per acre.

A person buying the land would naturally have taken into consideration what it was capable of yielding in

sugar when estimating its worth in the market. Such a person would have considered whether it was good or bad land, well or ill adapted to the raising of cane, and would have estimated what it would probably yield in tons of sugar per acre. This is exactly what the witness did. His answer shows it. He said: "Where it is good "land it will yield nine or ten tons per acre. This land "is good for cane." (Record 585.)

It is submitted that there was no error prejudicial to the plaintiff in the ruling of the Court.

ASSIGNMENT NUMBER 7.

(Assignment of Errors, Record 821. Bill of Exceptions, Record 587.)

Assignment number seven is based upon an exception taken to the overruling of an objection to the following question, "Do you know whether the Honolulu Planta- "tion Company had on the 6th day of July, 1901, a water "supply that was immediately available to the land in "question?"

The witness in answering the hypothetical question as to the value of defendant's leasehold interest upon his direct examination had assumed that there was no apparent source of water supply except a single artesian well, said to be brackish in character and situated within the boundaries of the particular portion of the defendant's plantation that was sought to be taken. (Record 584.) The question objected to was asked for the purpose of ascertaining whether the witness did not in fact know of another ample water supply available for use in irrigating the lands whenever required. (The Court will

remember that he had been told by plaintiff and the record shows that he did assume to use his own knowledge of the land in answering plaintiff's hypothetical question. Record, page 584.)

Certainly unless defendant could be restricted rigidly to the four corners of the exact portion of its plantation sought by the government, the question was permissible on cross-examination of a witness called as an expert to prove value at the instance of the petitioner. An intending purchaser would have made close inquiry as to the existence of an available water supply. (See discussion and authorities cited under assignments numbers 1 and 4, pages 15-35, supra.)

We submit that there was no error in the Court's ruling.

ASSIGNMENT NUMBER 8.

(Assignment of Errors, Record, page 822. Bill of Exceptions, Record, page 588.)

Assignment number eight is on all fours with assignment number seven. It is really a continuation of the same inquiry. The question was, "What was the extent "of that water supply?" The objection was, "I make the "same objection that we are getting outside of the land "in controversy." The answer was, "I don't know ex- "actly how much, how many gallons of water would be "pumped by those two pumps at Halawa; there is one "big pump; approximately about 10,000,000 gallons more "or less, and the other pump seven more or less in the "other pump."

ASSIGNMENT NUMBER 9.

(Assignment of Errors, Record, page 822. Bill of Exceptions, Record, page 588.)

Assignment number nine is based upon an exception taken to the order of the Court refusing to strike out the above answer. The motion was made in the following language: "Mr. Dunne. 'I move to strike out this tes-" "'timony on the ground that it appears from his answer "'that this alleged water supply which is not on the land "'but so-called 'immediately available' whatever that "'means, springs from somewhere in the Halawa Valley; "'it goes back to the old thing that your Honor has ruled "'out heretofore—trying to fix the value of this land by "'something else.'" The Court ruled as follows: "The "Court. 'Immediately available to this land, that is the "'question, and that is what the Court ruled on; if it is "'immediately available to this land they can prove it.'"

The water supply in the Halawa Valley, as shown by the record (Record, 549) is only a mile and one-half away from the land sought to be condemned. The witness had placed a certain valuation upon the leasehold interest sought to be condemned upon the misleading assumption that the only apparent source of water supply upon it was the single artesian well brackish in character. Now, if the defendant's property could be taken from it on any such false assumption of the real situation, and, moreover, it could be estopped from showing by inquiry on cross-examination the true situation and condition of the property and the surroundings, is it not clear that the jury would be given a very wrong impression of the real usefulness and value of the defendant's leasehold inter-

est? Is it not equally clear that such property would thereby be taken from the defendant without payment of "just compensation" therefor? That there was but a mile and one-half away from that portion of defendant's land an ample water supply belonging to it, and consisting of a flow of upwards of 17,000,000 gallons, as shown by the witness, was a very important circumstance for the consideration of an intending purchaser. Without an available water supply for the purpose of irrigating the land taken it would be without any value. But, in view of the fact that there was that water supply there and imediately available for such use, the land was of great value, of far greater value, as we believe than the amount of the verdict returned by the jury. Surely, then, the defendant had a right on cross-examination to prove its existence. In the language of Mr. Justice Brewer, would not the constitutional provision consist more in sound than in substance if defendant were precluded from doing so? Would not reasoning which would lead to such a result have some vice, "at least the vice of injustice"? (See also discussion and citations under Assignment No. 1.)

It is submitted that there was no prejudicial error in the ruling complained of.

ASSIGNMENT NUMBER 10.

(Assignment of Errors, page 823. Bill of Exceptions, page 589.)

Assignment number ten is on all fours with the foregoing. The question asked on cross-examination of the same witness was, "Do you know whether there is a flow-

" ing stream immediately available for use upon this land " within the lines of the Honolulu Plantation Co.?" The objection was as follows: " Mr. Dunne. ' I object to that " ' on the grounds heretofore stated, and as going out- " ' side of the land in controversy.' The Court. ' If it is " ' immediately available to this land the witness can an- " ' swer the question.' " After exception the witness answered, " I do."

This is fully covered by the discussion under Assignments Nos. 1, 4, 7 and 9, supra.

ASSIGNMENT NUMBER 11.

(Assignment of Errors, Record page 824. Bill of Exceptions, Record page 589.)

Assignment number 11 is based upon an exception taken by plaintiff to the ruling of the Court upon an objection to the following question asked on cross-examination of said witness: "Well now, assuming that the " land was in the same condition on the 6th of July, " 1901, and considering the situation, and the uses it " might be put to, and the improvements put upon it, the " plowing that had been done,—all of its usefulness, the " whole property of the Honolulu Plantation Company, " that is available for use in connection with that land, " assuming those things, what do you say as to the value " of the leasehold interest? "

The question was objected to upon the ground that it was incompetent, an incompetent hypothetical question, that it involved matter not established by any evidence in the case. The Court ruled as follows: " Answer the question." But before the witness did answer the ques-

tion the reference to the whole plantation was stricken out. (Record 590.) The difference between this question and the one asked by counsel for plaintiff is this, counsel for plaintiff limited the witness's attention by assumption stated to him to a false situation, or at least to a situation but half told. The witness was for practical purposes made to assume that there was no mill and no water supply available for use in connection with the leasehold. Now when counsel for defendant, on cross-examination of this witness, assumed nothing but told him to take the situation just as it was and put a value on the lease, can it be that there was any error in permitting him to do so? Certainly on cross-examination this was a legitimate inquiry of a witness called by plaintiff. A wide latitude is always allowed on cross-examination of an expert called to prove value.

3 Jones Evidence, sec. 391.

ASSIGNMENT NUMBER 12.

(Assignment of Errors, Record 825. Bill of Exceptions, Record 598.)

Assignment number 12 is on all fours with assignment number 5. It was a matter resting in the Court's discretion; moreover, counsel stated that he had no objection to the latter part of the question, which, as shown by the answer of the witness, was the only part that the witness attempted to respond to.

We submit there was no error in the ruling.

ASSIGNMENT NUMBER 13.

(Assignment of Errors, Record 826. Bill of Exceptions, Record 599.)

Assignment number 13 cannot be seriously urged by counsel for plaintiff. The question was, "Do you know the yield of the Halawa Valley?" The answer was, "I do not." The question was perfectly proper, but if it was not proper the answer of the witness discloses no prejudice.

ASSIGNMENT NUMBER 14.

(Assignment of Errors, Record 827. Bill of Exceptions, Record 601.)

This assignment is based upon an exception taken to a ruling of the Court sustaining the objection of defendant to a question asked by counsel for plaintiff of the witness, F. W. Thrum, calling for his opinion as to what he would be *willing to pay* for the leasehold. The witness had testified that he was a surveyor and had expressly stated, as appears on the face of the Record (page 597) as follows: "I do not consider that I have any knowl- "edge of the value of real estate and leaseholds in and "about Pearl Harbor and that vicinity." The Court held that in view of the testimony of the witness to the effect that he was unable to express an opinion as to the value he was not an expert and his opinion could not be taken.

In this ruling the Court certainly did not abuse its discretion. As the Court said he was a surveyor and knew the land, but plaintiff could not prove by him the value of the land, unless he knew something about it.

"He said he did not know anything about it." (Record, page 597.)

We submit there was no error in the ruling.

ASSIGNMENT NUMBER 15.

(Assignment of Errors, Record, page 827. Bill of Exceptions, Record, page 602.)

Assignment number 15 relates to a ruling of the court striking out a certain statement of the witness as to what he had done on the lands of an adjacent plantation in the year 1895, six years prior to the trial. The whole gist of the witness's testimony was to the effect that his report as to what land was available for raising sugar cane in a certain field on an adjacent plantation was accepted by the manager of that plantation. The evidence was attempted to be taken on redirect examination, and counsel for defendant objected to it on the ground that it was not proper re-direct, the Court struck it out on the ground that it was immaterial. The evidence was manifestly intended to bolster up the qualifications of the witness, and the Court held that it was immaterial for the witness to show what he had done at that time on other lands and how his report had been used. The whole matter was one within the discretion of the Court. It only went to show the qualifications of the witness to express an opinion as to the quality and value of the land sought to be condemned, upon which, because of the witness's unequivocal declaration that he was not an expert, the Court had already ruled that he was incompetent to testify.

ASSIGNMENT NUMBER 16.

(Assignment of Errors, Record 828. Bill of Exceptions, Record 622.)

This assignment is based upon an exception taken to a ruling of the Court overruling an objection of plaintiff to the following question asked on cross-examination of the witness J. A. McCandless called by plaintiff: "Q. 'What "'is the value set on that leasehold interest of 142 "'acres?'" The question was objected to on the ground that the records of the Court showed that the controversy as respecting that leasehold interest had been amicably settled as between the Oahu Sugar Company (the owner of the leasehold interest) and the government, that it was not proper cross-examination, that it was not directed to any matter testified to by the witness in chief, and had no materiality upon the inquiry, the Court ruled as follows: "The Court will not rule out that testimony, "but you can meet it, if it is met at all, because the "Court will not rule out any testimony that has a ten-"dency to explain any facts that are introduced before "the jury." The answer was that the company had placed a valuation of $200,000 "on 142 acres on Ford Island *that I have been testifying about.*" (Record, 622.) A reference to the record (page 620) will disclose the following as a part of the testimony on the direct examination of this witness: "A. 'It is a hard thing to put a "'valuation upon that, I still stick to my original state-"'ment—I do not think it is worth any more to the com-"'pany than they had to pay for it. I want to explain "'my answer. To put a figure per acre for the market "'value of that leasehold interest, as it stood July 6th,

"'1901, I should say $15 or $20 an acre—I say $15 or $20
"'for all that was cane land. Now I would like to ex-
"'plain why I made that statement. I am a Director of
"'the Oahu Sugar Company, that is on Ford Island and
"'also on the Peninsula, and, about a year and a half or
"'two years ago, the company of which I am a Director
"'secured a lease; the Oahu Sugar Company leased Ford
"'Island and the Peninsula from the Ii Estate for $12.50
"'per acre per annum; and there is no comparison be-
"'tween the soil on Ford Island and the Peninsula with
"'this piece of land. I just want to make that state-
"'ment that the Oahu Sugar Company considered when
"'we leased that that we had given every cent it was
"'worth to the Oahu Sugar Company, and they would
"'not give any more for it. I was one of the Board of
"'Directors of the Oahu Sugar Company at the time,
"'and I know its business transactions, and I was pres-
"' ent when these transactions were had and I am speak-
"'ing from my own knowledge.'"

Now on cross-examination he admitted that proceedings to condemn a portion of the Ford Island leasehold that he had been testifying about were instituted by the government. His attention was called to the answer of the plantation alleging a valuation of 142 acres out of that leasehold, and, after identifying the signatures of the officers of the corporation, he was asked the question objected to, namely, "What is the value set on that leasehold interest of 142 acres?" and he answered, "I see "from that answer of the Oahu Sugar Company that they "place a valuation of $200,000 on the 142 acres of Ford "Island *that I have been testifying about.*" Clearly this was

proper cross-examination, it was the valuation fixed by his Board of Directors on the very leasehold interest he had been testifying about. He had said on his direct that he knew that the Board of Directors considered when they agreed to pay $12 per acre per annum for it, that they had given every cent it was worth to them. The inference was that the Ford Island leasehold was not considered to be of any value by the Board of Directors, and therefore that the leasehold of the Honolulu Plantation was worth nothing. He said that he referred to the Oahu Sugar Company lease as a reason for his testimony that the Honolulu Plantation Company's lease was worth no more than the rent they paid. When he was confronted by the sworn answer of that corporation he was naturally a discredited witness. Can there be any doubt of the defendant's right to so discredit him? It is for just such purposes that the right of cross-examination exists and has been recognized as the most powerful weapon for the ascertainment of truth and the real worth of a witness's testimony. Greater latitude is allowed, too, on cross-examination of a witness testifying to his opinion of value.

3 Jones Evidence, secs. 391, 826.

We submit there was no prejudicial error in this ruling.

ASSIGNMENT NUMBER 17.

(Assignment of Errors, Record, page 830. Bill of Exceptions, Record, page 625.)

This assignment is on all fours with assignments of error numbers 5 and 12. The objection was that the question involved three separate and distinct questions.

The matter was one in the discretion of the Court, and there was no prejudicial error in the ruling complained of.

ASSIGNMENT NUMBER 18.

(Assignment of Errors, Record, page 831. Bill of Exceptions, Record, page 625.)

This assignment is based upon an exception taken to a ruling upon an objection to a question, "Why not?" The witness, Mr. Low, defendant's manager, having made a statement to the effect that sugar had not been grown on this land by the Honolulu Plantation Company, was asked, "Why not?" the answer was that the plantation was a new plantation and that the company had not been able to get out to this land, the further statement was made that all new plantations must start from the mill and work out.

The question was asked only incidentally to permit the witness to make an explanation of his prior answer. Clearly there was no prejudicial error in this; it was a mere incident of the trial and of the taking of the testimony of defendant's manager.

ASSIGNMENTS NUMBERED 19 AND 20.

(Assignment of Errors, Record, pages 831-834. Bill of Exceptions, Record, pages 627-629.)

Assignments numbered 19 and 20 cover the same identical matter and the whole is embodied in Assignment number 20. The question was answered before an objection was made. After answer a motion was made to strike out the testimony of the witness as to the value of

the leasehold interest of the Honolulu Plantation Company on the ground that it is settled law that what it might be worth to the Honolulu Plantation Company was not a fair test of the market value. The Court refused to strike it out. Counsel for defendant then asked the witness what the market value was, to which the witness answered as follows: "That is what I said. I have not "made up my mind. I think it ought to be $250,000 or "$300,000." The Court then asked the witness, "Is there any difference between the value and the market value?" to which the witness answered, "Yes, sir. The Honolulu "Plantation Company, it might have a greater value to "the Honolulu Plantation than to any one else, if it were "put in the market there would be three bidders for this "land—the Ewa Plantation, the Oahu Plantation and "the Honolulu Plantation—but it has a distinct value to "the Honolulu Plantation." Counsel for plaintiff then made a motion in the following language: "To save the "rights of the government I move to strike out the tes- "timony of the witness relative to the value of this lease- "hold to any particular individual, to the Honolulu "Plantation Company, on the ground that compensation "is the market value and not the value which property "may or may not have to a particular individual." The Court: "No, the Court will not strike it out."

It was what should constitute "just compensation" for that *portion* of the defendant's *plantation* and not what might be the "market value" of it as a distinct, separate, marketable lot of ground that was in issue. But, while this is true, the parties were nevertheless restricted to proof of market value, and, so the subsequent page of the

record will show, the government had the fullest benefit of the rule of "market value" as a test of "just compensation."

Before considering the law we beg to call the Court's attention to some of the evidence that had already been given. Capt. White (Page 549 of the Record) testified that the Honolulu Plantation Company's property extended over 5,000 or 6,000 acres surrounding the land in question. The plantation was started in May, 1898 (Record 625). The corporation exhibit introduced generally by counsel for plaintiff showed that the company had spent for cost of mill, railroad, cars, reservoirs, waterways, flumes and tressels, growing crops, machinery, tools and implements etc., $2,264,299.92. (Record 613.)

Mr. Low, manager of defendant's plantation, testified (Record, page 625) that the plantation had about 8,000 acres of land of which 5,000 were suitable for cane around and adjoining the land sought to be condemned. He furthermore testified that the plantation had a water supply immediately available for the land, situated in the Halawa Valley and consisting of artesian wells and flowing streams. He also testified that the plantation lands extended 5 miles in one direction from the land sought to be condemned and 2½ miles in the other. (Record 626.) It is easily demonstrated; indeed, it is perfectly obvious, that a comparatively small parcel of land adapted to the growth of sugar cane would not be of very great value standing alone; but to a company that has the equipment, mill, water supply and all things necessary to make the land valuable for the growth of sugar cane, it would have distinct value as testified by Mr. Bolte. And

right here we beg to call the Court's attention to the fact that Mr. Bolte was a witness peculiarly well qualified to give an opinion upon the value of the defendant's property which the government was seeking to condemn. His business was that of looking after sugar plantations, ranches and property of other people. He had been engaged in business connected with the sugar industries in the Hawaiian Islands 23 years. The character of his business in regard to sugar plantations was that of going on the plantations, looking around and advising with the manager and people as to the financial portion of the business. He had been doing it for 23 years on the plantations of Waimanalo, Kahuku and Heeia. He was, at the time of the giving of his testimony, Chairman of the Tax Appeals Court for the Island of Oahu, on which the plantation was situated. His duty as such Chairman of such Board was to determine the value of property that was taxed and the value of the different interests. He was familiar to a certain extent, with the value of the lands of the Island and knew the land that the Government was seeking to condemn, and he testified that he thought from the examination he had made and the experience he had had in the land business that he was able to state the value of the leasehold interest. (Record, pages 627-8.) When, therefore, this witness said that this piece of land had a *distinct* value to this defendant, that statement and its bearing on the question of "just compensation" was entitled to serious consideration.

The Supreme Court in Monongahela Nav. Co. v. U. S., 148 U. S., at page 343, in considering an offer to prove overruled by the trial court (set out on pages 318 and 319),

said: "The question of just compensation is not deter-
"mined by the value to the government which takes, but
"the value to the individual from whom the property is
"taken; and when by the taking of the tangible property
"the owner is actually deprived of the franchise to col-
"lect tolls, just compensation requires payment, not
"merely of the value of the tangible property itself, but
"also of that of the franchise of which he is deprived."

In this case, as has been pointed out, the plantation had spent more than $2,000,000 in building a mill, creating a water supply, obtaining equipments, etc. It had 8,000 acres of land or 5,000 acres of cane land. The government was taking 561.2 acres of land, containing 342 acres of cane land. The portion of land taken was about 1-14 of cane land as well as 1-14 of the whole. It might well be argued, in view of the situation, and it is the firm belief of defendant's manager and his counsel that the market value of the portion taken was no proper test of the real value thereof or of the just compensation to which defendant was entitled. But, as already stated, the government did, in fact, have the full benefit of the rule as will be more fully pointed out hereafter.

The Supreme Court of Pennsylvania in Montgomery County v. Schulkill Bridge Company, 110 Pa. 54, 59, which decision is quoted from and cited by the Supreme Court in Monongahela Nav. Co. v. U. S., page 329, uses the following language: "The principle was invoked by
"the defendant that the true measure of damages was
"the market value at the time of the taking, * * *
"The principle is well enough, but it has no application
"to the facts of this case. The property taken was of

"a peculiar character and can hardly be said to have "a market value. It was a bridge and the corporate "franchise of the company owning it. There are no sales "of such property by which it can be compared, and a "market value, in the fair sense of the term, ascertained. "One bridge may be of little value, because unproduc- "tive; another of no greater size and cost, by reason of "its location may be extremely valuable."

There is no doubt that this land would be worth more to the Honolulu Plantation ompany than to any of the other plantations in the vicinity, for it is situated within the boundaries of that plantation and can be easily used by that company. A segregated piece of land of the character of the portion of land in question could not be worked to advantage by a plantation whose nearest border by the usual course of travel, was five miles or more distant from it; and it necessarily would be worked at still greater cost by another plantation situated still further on.

If it is true that this piece of land was worth more to the defendant than to any one else and that the defendant is entitled to the value of its property before the government can take it by the extraordinary power of eminent domain, then to confine the defendant to proof of the value not to it, but according to a price that it might bring at an assumed public sale would be to deprive the defendant of just so much compensation. 148 U. S., 328, 329.

Let us put the same idea in the light in which it must have presented itself to the mind of Mr. Bolte, namely, that if the portion of land condemned were to be sold

under the hammer, the Honolulu Plantation Company as a bidder in competition with the adjoining plantations would have to pay for it but a little more than the next highest bidder might have offered for it. In other words, if it was worth $200,000 to Ewa, $250,000 to Oahu and $400,000 to the Honolulu Plantation, on being offered for sale it would not bring $400,000, but would only bring a little more than $250,000, that being its value to the Oahu Plantation Company. That is the figure at which competitive bidding would stop. But in the language of the Supreme Court in the decision quoted, to confine this defendant to such proof as that would be to deprive it of just so much compensation.

We believe that we have demonstrated that the value of this portion of defendant's plantation and the just compensation that, under the constitution, it was entitled to receive should have been estimated not at what it would bring at a public sale (the test ultimately laid down by the Court Record 717), but by what it was really worth, according to the testimony of impartial witnesses, to the defendant plantation itself.

See also, S. & N. W. Ry. Co. v. C. & E. R. R. Co., 112 Ill., 590, 605-606-607;

L. S. & M. S. Ry. Co. v. S. C. & W. I. R. Co., 100 Ill. 21-33;

2 Jones on Evidence, page 865;

2 Lewis Em. Dom. (2nd Ed.) 1052;

St. L. K. & A. Co. v. Chapman, 16 Pac. 695, 696.

We quote the following from St. L. K. & A. Co. v. Chapman:

"The law does not presume or require impossibilities; "it only demands and requires the best proof under the "circumstances of each case, Where property has a mar- "ket value, the rule is strict, and requires only that value "to be shown; but where it is shown that the property "is without a market value, then the law allows the next "best evidence to be given to ascertain its value. The "property then may be compared with other property. "Its value may be determined by persons who are shown "to be judges, or who have knowledge of the value of "real estate in that vicinity and their opinions may be "given of the value of the property, which, in this case, "was the best evidence it was possible to procure. Some "classes of property always have a market value; other "property, by reason of its location or distance from mar- "ket, or other circumstances is without a market value. "Nevertheless it has a value, though the means of ascer- "taining it are changed where the rule requiring market "value cannot be applied." (16 Pac., 696.)

The Supreme Court of Illinois uses some apt language in the first case cited when considering what constitutes the true measure of compensation for property of this character. The following appears in the syllabus:

"Where property sought to be condemned for a public "use has a market value, and is not devoted to any par- "ticular use, making it more valuable to the owner than "to any one else, such value affords the true measure of "compensation to be paid for it; but when the proof "tends to show the property has no market value by rea- "son of the particular use to which it is being applied, it "is error to instruct the jury that the compensation

"should not be less nor more than its fair market value, "and to refuse all instructions based on the theory that "it has no market value.

"Where, in the nature of things, there can be no mar- "ket value of a piece of property by reason of being used "in connection with and as a part of some extensive busi- "ness or enterprise, its value must be determined by the "uses to which it is applied. In such case the market "value of neighboring lands, differently circumstanced, "may be shown, as throwing some light on the question, "but it falls far short of furnishing a true or adequate "test of the value of the property." (112 Ill., 590.)

And in the opinion (112 Ill., at page 606) the following language is used:

"One of the controverted questions in the case was, "whether as a matter of fact, property circumstanced as "this was, had any market value in that vicinity. We "think the evidence tended to prove it had not, whatever "the weight of evidence may have been on that question. "And as the Court had refused all instructions, with the "exception above mentioned, presenting this aspect of "the case, and had undertaken to instruct the jury fully "with respect to their duty, it should have told them how "the amount of compensation was to be determined if "the proofs failed to establish a market value for prop- "erty situated as that was. This the Court did not do. "In most cases the rule laid down by the Court would be "correct, but there are many instances where, if thus laid "down without qualification, the rule would clearly be "misleading. Indeed, in all cases where a piece of prop-

"erty, by reason of having been applied to a particular "use, has a special value to the owner,the rule announced "by the Court would be improper, and if observed by the "jury, would necessarily lead to an unjust result. It is "claimed by appellant and it will not be denied, that the "evidence tends at least to show that this particular "piece of ground constituted a part of the terminal facil- "ities of appellant's great railway, extending thousands "of miles, and consisting of numerous divisions and "branches. The lot in question is at present and for "years past has been, used in transferring freight to and "from the company's tracks, to the lake, and is accessible "to all the divisions of appellant's road. It is also "claimed by appellant, and the evidence tends to prove "the fact, that no other property in that vicinity so es- "sential and desirable for the purposes of the company's "business can be obtained if that is taken. Now, it is "manifest that by reason of the use to which this prop- "erty is applied, and its connection with the company's "business generally, it has a special value to the company "which it does not have to any one else, and which the "general market value of other property in that locality "not thus circumstanced throws but a little, if any, light "upon, much less furnishes a rule by which to determine "its value. Strictly speaking, the market value of any- "thing is determined by what it would sell for in market "in due course of business, and this is ascertained by "actual sales or offers for like articles. This applies to "land as well as anything else. But the term is some- "times used in a more extended sense, as including the "estimation which well informed persons would put upon

" an article in the absence of a market value, in the strict " sense of that term, and this kind of evidence is always " admissible to show value. We know, as a matter of " common experience, that railway companies rarely, if " ever, sell out their tracks, depot grounds, or other like " property by piece meal. At least such transactions, we " apprehend are of so rare occurence as to afford no evi- " dence of a market price for that kind of property. It " is true in this case, proof was made of several sales of " land in the vicinity of the property in question, desig- " nated by the witnesses as dock property; but none of the " pieces mentioned as having been sold were situated as " the property in dispute is. It is true, the latter like " those, is dock property, but it is something more. It is " a part of a great railroad property, and it is an impor- " tant factor in the handling and transportation of " freight, in the heart of a great city, by the company " owning it. Many illustrations might be given where " property evidently has no market value, but one will " suffice. Take the case of a railroad crossing. The " value of the part of the track taken for such crossing " cannot be ascertained by any reference to market " values, and if determined by the value of the land taken " at customary prices of land in the neighborhood, the " value in most cases would be inappreciable; and yet to " the company who owns the track, it always has a sub- " stantial value, that well-informed, intelligent railroad " men would readily know how to estimate. Where, in " the nature of things, there can be no market value of a " piece of property, by reason of being used in connection " with and as a part of some extensive business or enter-

" prise, its value must be determined by the uses to which " it is applied. While in such cases the market value " of neighboring lands differently circumstanced may be " looked to as throwing some light upon the question, yet " that alone would fall far short of furnishing a true or " adequate test of the value of the property. As was said " in *Railroad Co.* v. *Kirby*, 104 Ill., 345: 'The value of the land " ' consists in its fitness for use, present or future, and be- " ' fore it can be taken for public use the owner must have " ' just compensation. If he has adopted a peculiar mode " ' of using that land by which he derives profit, and he " ' is to be deprived of that use, justice requires he should " ' be compensated for the loss. That loss is the loss to " ' himself. It is the value which he has, and of which he " ' is deprived, which must be made good by compensa- " ' tion.' Substantially the same idea is well expressed " in the English case of *Beckett v. Midland Railway Co.*, " L. R., 3. C. P., 82. It was there said: ' The property is " ' to be taken in *statu quo*, and to be considered with ref- " ' erence to the use to which any owner might put it in " ' its then condition.' This statement we regard as quite " accurate, and it will be observed it fully meets the case " where the property sought to be taken has some special " value to the owner by reason of having adopted some " particular use for it. This might happen on a farm, as " well as in a city or town. For illustration: Suppose the " owner of a farm concludes to go into the dairy busi- " ness, and proceeds to spend several thousands of dollars " on his farm in preparing stalls and sheds for his cows, " and in making suitable preparations for the handling " of the milk and converting it into butter and cheese.

"When the farm is thoroughly fitted up for this purpose "it is very clear it would have a special value to him that "it would not have to any one else unless to some one "who should want it for the same purpose. One who "wanted it for mere farming purposes could not afford "to pay but little more for it on account of its adaptation "to the dairy business; and assuming that was the only "dairy farm in that locality, it is clear there could be no "market value for a farm thus situated, while there "might, and probably would, be a market value for farms "like that adapted for farming purposes merely. Sup- "pose, in the case we have put, a railway company hav- "ing the right to locate its road across this farm, so "locates its tracks as to completely destroy all the im- "provements that have been made in fitting it up for "dairy purposes, but not at all injuring the farm other- "wise. Now, is it not manifest that in such a case to "limit the owner's compensation to the market value of "the land taken, would be grossly unjust and inadequate? "And yet, in principle, we see no difference between the "case suggested and the one in hand. **In condemnation "cases the owner of the property taken is not required to "make any pecuniary sacrifices at all. He is entitled to "whatever the property is worth to him, or any one else, "for any purpose to which it is adapted; but the special "uses or purposes to which it is adapted must be real; "that is, founded on facts capable of proof, and not "merely speculative or imaginary."**

As further illustrative of the principle stated we call the Court's attention to another still more forcible suggestion:

Suppose that in this case the government instead of taking 561.2 acres of defendant's plantation lands, was taking the whole 8,000 acres save the single portion on which the mill, offices, pumping machinery, and so forth, stand. That would take the land and leave the adjuncts. But in leaving the adjuncts and taking the land $2,000,000 worth of property in place would be reduced to a comparatively insignificant valuation. It would be worth no more than what it would bring as second-hand material on a market that probably would have no present use for it.

Can it be possible that any one would seriously urge that such a rule would be within the meaning of the constitutional amendment? Would not this illustration clearly show that such a rule of law would deprive the defendant of its property without just compensation? Would not that safeguard of the citizen against the power of the government be reduced to a matter "more of sound than of substance"? Is there any difference in principle between taking the whole and taking a part on a false and arbitrary basis?

When the record of the trial in the Court below is tested by such authorities as the one last quoted from and Monongahela Navigation Company v. U. S., it will be found, even in the absence of a bill of defendant's exceptions, that defendant is the one that has just cause to complain of the course of the trial in the Court below. At any rate, the record will fully disclose that the plaintiff was not prejudiced by the Court's rulings and charge.

We believe that in this case market value was no just test of what the defendant was entitled to receive for the

taking of this portion of its plantation lands. But even if it were the test, the plaintiff had the full benefit of it. Because of intimations given out by the Court as to what the jury would be instructed at the close of the case, we asked all the witnesses called after the defendant's manager to give the market value only. Moreover, the Court instructed the jury in the following language:

"I have told you that the fair market value of the prop-
"erty (I have not as yet, but will) as that property actu-
"ally stood on July 6, 1901, should be paid for it; and in
"this behalf I charge you that what this property would
"bring at a fair *public* sale, where one party wants to sell
"and another wants to buy may be taken as a criterion of
"its market value."

Moreover, the testimony came within the definition of "market value," as given by all the authorities. It was but one way of fixing that value for which the defendant if it wanted to sell but did not have to, would have been willing to part with its leasehold.

It is submitted without further elaborating upon the subject that there was no error prejudicial to the government in the rulings set out in the foregoing assignments.

ASSIGNMENT NUMBER 21.

(Assignment of Errors, Record 834. Bill of Exceptions, 633.)

This assignment is based upon an exception taken to a ruling made by the Court upon a motion to strike out an answer given to a question which was not objected to when asked nor stated in the record (Record 633), but in

the assignment of errors it is alleged to have been, "What "is the value of the use of the buildings upon the land "for the remainder of your term of the lease?" The grounds of the motion are not stated in the assignment of error, but by reference to the record it appears that after the witness had testified as follows: "Prior to the 6th of "July, 1901, the company had done considerable work "on this land—had fully prepared it for a growing crop "of cane by clearing it of brush and rock, and by double "plowing it; making surveys, laying the land out, plow- "ing it, platting it out to arrive at the manner of water- "coursing it; laying out the watercourses. A portion of "the land was selected as the best available camp site "that there was on that portion of the company's prop- "erty and a temporary camp was built. The value of the "use of the buildings upon that land for the remainder "of the term of our lease was $13,500. I believe the "buildings are worth that to this company, because I do "not believe that there would be a vestige of the build- "ings left at the termination of the lease forty years "from now." The plaintiff made a motion as follows: "Mr. Dunne. 'I move to strike out that testimony; it is "'perfectly apparent from that testimony that it makes "'no attempt to reach the market value; and upon the "'ground that it is illegitimate the value it may be to "'any particular individual as distinguished from the "'market value.'" Upon which the Court ruled: "I will "allow the jury to consider it." (Record 633.)

This testimony was proper from several points of view. In the first place the witness did not expressly limit the value to the defendant. In the second place it is per-

fectly clear that those buildings constituting a laborer's camp out in the middle of the defendant's plantation could not well have had a value to any one else than the defendant. It was the only person or corporation that could possibly have had use for the buildings. Moreover, the testimony was justified by certain questions asked on *re-direct* examination by plaintiff of its witness Archer. He testified against the objections of defendant that in making an estimate of $100,000, as the value of the leasehold, he had allowed $15,000 for the buildings situated on the land in question. In view of this testimony brought out by plaintiff it was entirely proper for the defendant's manager to give *his* opinion of the value of the use of said buildings. Moreover, it was the theory of the plaintiff that the value of the improvements should be separately shown, as appears both by the question asked of Archer on re-direct and by the form of verdict which the plaintiff requested the Court to give to the jury both in this trial and on the former trial, which said form of verdict required the jury to make a separate finding of the value of "improvements." It is also shown by the charge of the Court upon the subject of improvements, which charge was not excepted to by plaintiff but was excepted to by defendant. The Court charged the jury: "And if from "the evidence you shall find that the defendant had any "improvements on that portion of the land covered by the "leasehold interest of the defendant, and which is sought "to be condemned by the United States, which were there "prior to the 6th day of July, 1901, you are to find the "*value of the user* of such improvements to the defendant "for the remainder of the term of the leases, *separate and*

"*distinct* from the value of the leasehold interest itself in "said lands."

Contrast with this the instructions requested by defendant (Record 448).

It was only to meet this contention and theory of plaintiff, and to show to the jury what value defendant's manager placed upon the use of the buildings that had been erected by it *on* the land that the evidence was given. As already point out, the buildings could have no value to any one else than the defendant.

It is submitted that there is no error in the ruling.

ASSIGNMENT NUMBER 22.

(Assignment of Errors, Record 835. Bill of Exceptions, Record 634.)

Assignment number twenty-two is based upon an exception taken to the ruling of the Court permitting the witness Low to go on with an explanation he was making and the full substance of "the evidence so refused to be "striken out" was as follows: "A. 'We have soil sim-"'ilar in the Halawa Valley that we have raised cane on.' "Mr. Dunne. 'I object to this comparison of outside "'soil; he was asked concerning this soil.' The Court. "'He can go on if he will; let us hear it.' Mr. Dunne. "'We except.'"

It does not appear that there was any error in this ruling. It was like the question, "Why not?" the basis of assignment number 18 a mere incident of the trial. It was, on the face of it, but a part of an explanation the witness was making at the time. But even if it had been

brought out by a question that counsel for defendant had asked the witness, or if a motion to strike out the portion of the testimony quoted had been made, the inquiry would have been perfectly proper under the law as stated in Monongahela Nav. Co. v. U. S., 148 U. S., 328, the Court there asks the question: "How shall just compensation "for this lock and dam be determined? What does the "full equivalent therefore demand? The value of the "property, generally speaking, is determined by its pro- "ductiveness—the profit which its use brings to the "owner. Various elements enter into this matter of "value. Among them we may notice these: *Natural "richness of the soil as between two neighboring tracts*—one "may be fertile, the other barren; the one so situated as "to be susceptible of easy use, the other requiring much "labor and large expense to make its fertility available."

It is submitted that there was no error in the proceedings set out in the assignment of error.

ASSIGNMENT NUMBER 23.

(Assignment of Errors, Record page 835. Bill of Exceptions, Record page 636.)

This assignment is based upon an exception set forth in the following proceedings which are set out in said assignment as "the full substance of the evidence": "Mr. "Silliman. 'What was its value on the 6th of July, "1901?' Q. 'To the Honolulu Plantation Company?' "Q. 'Yes, sir.' Mr. Dunne. 'The same objection.' (Not "a proper test of market value.) The Court. 'The same "ruling.' Mr. Dunne. 'We except.' A. '$400,000.'"

A defendant the value of whose property is in issue is allowed greater latitude, subject to cross-examination, in testifying to such value, or what is the same thing, to the damage which he will sustain by reason of the taking of his property or the amount of compensation that he should receive. It is but fair that one whose property is taken at the instance of another should be permitted to state what his loss will be.

We quote the following from Derby v. Gallup, 5 Minn. 119, Gil. 85, 98: "In the course of examination of Griggs "he testified to the value of certain real estate owned by "him, which was objected to by defendant's counsel on "the ground that he had not shown himself competent to "give an opinion as to the value of the property. The "objection was overruled and we think properly. In Joy "v. Hopkins, 5 Denio, 84, it is held that the rule that a "witness cannot, in general, speak of matters of opinion, "does not apply where the value of property is in ques- "tion. Also Lamour v. Caryl, 4 Denio, 370; Brill V. Fla- "ger, 23 Wend. 354; Culver v. Haslam, 7 Barb. S. C., 314, "14 S. & R. 137. From the nature of the case the jury "must ordinarily form their opinion as to the value of the "property, more or less from the opinion of witnesses, "as it would often be difficult, if not impossible, to make "such statement of facts in regard to the value as would "suffice to enable them to form a correct judgment; and "the presumption is that the owner of property is better "acquainted with its value than a stranger. The evil "sought to be prevented by the rule excluding opinions "will rarely prove of serious consequence, in cases of this "nature, from the admission of such evidence." 5 Minn. Gil. 98.

From Hayden v. Albee, 20 Minn., 159, Gil. 143, at Gil., 146, we quote the following language: "The testimony of "the plaintiff as to the value of the ford from the time it "became impassable in consequence of the dam in 1868 to "the time of the commencement of this action was the "testimony of the owner of the ford who had habitually "used the same in hauling crops and wood from one "part of his farm to the other, and who was, therefore, "presumably as well able as any person to estimate the "value of its use, as a ford, the correctness of his esti-"mate being of course subject to the test of a cross-ex-"amination."

In all other respects this assignment is similar to assignment 20, and it is submitted, upon the authorities there quoted, that there is no error prejudicial to the plaintiff in the ruling complained of.

ASSIGNMENT NUMBER 24.

(Assignment of Errors, Record 836. Bill of Exceptions, Record 636.)

This assignment is based upon an exception taken to a ruling of the court upon an objection made by plaintiff in the following language: "I object to that, it is a mere "ambiguous question—a sort of question that would per-"mit almost any sort of an answer, hearsay or other-"wise." No motion was made to strike out the answer given. Manifestly the objection went to the form of the question and not to the substance of the evidence received. It was therefore addressed to the discretion of the Court below. But an examination of the answer will

disclose that there was nothing prejudicial to the plaintiff therein. The witness states that the figures $50,000 set forth in the tax return were a transcript from the company's books showing the cost of three rice plantations the company had purchased. Plaintiff did not move that this testimony be stricken out, and if incorrect that fact could easily have been shown upon cross-examination upon an inspection of the company's books.

ASSIGNMENT NUMBER 25.

(Assignment of Errors, Record 837. Bill of Exceptions, Record 650.)

This assignment is based upon an exception taken to a ruling of the Court upon an objection based upon the ground of irrelevancy taken by the plaintiff to the following question asked of the witness W. R. Castle, called by defendant as an expert: "What knowledge have you of the development of the plantations in that district?" This question was but one of a number of questions asked of the witness as stated at the time for the purpose of showing his qualifications to testify as an expert, it having been shown that the property was a portion of a large sugar plantation belonging to the defendant, and that there were two other plantations in the vicinity, one known as Ewa Plantation and the other as Oahu Plantation. It was entirely competent, as tending to show the qualifications of the witness, to show what knowledge he had of the development of other plantations in connection with his knowledge of the lands of the Honolulu Plantation. The answer was: "I have been identified "with the plantations there—the Ewa more particularly,

"and have known about the development of all of these "plantations, beginning with Ewa and coming around "to the Honolulu Plantation."

Manifestly this was competent evidence tending to show the qualification of the witness to testify as an expert.

ASSIGNMENT NUMBER 26.

(Assignment of Errors, Record 839. Bill of Exceptions, Record 652.)

This assignment is based upon an exception taken to the overruling of an objection made by counsel for plaintiff to the hypothetical question asked by counsel for defendant of the said witness W. R. Castle. The objection was based upon the grounds that the question was irrelevant, incompetent and immaterial, not justified by the evidence and without foundation in that there was no evidence that the witness knew what was the market value on July 6th, 1901. The objection does not point out in what respect the question was not justified by the evidence, and we are at an utter loss to know what counsel meant thereby. It was admitted by both sides that the plantation had a thirty-nine years' lease, that seven years' rental had been paid, that 32 years was on a basis of 3½ per cent of the sugar produced, together with the payment of taxes, that the lease covered other lands in addition to the portion sought to be condemned, and that there was a minimum rental provided for in the lease. The defendant's manager and surveyor had testified that there were 342 acres available for planting in the land sought to be condemned. (See hypothetical question put

by plaintiff to the witness Archer, Record 584; also hypothetical question put by plaintiff to witness L. L. McCandless, Record 595; lease from Bishop Trustees to the Honolulu Sugar Company, Record 603, 608; testimony of Low, Record 631-641.) Statement showing that there were 342 acres of cane land, put in evidence by plaintiff. (Record 641.) And map showing the exact acreage and location of all cane land claimed by the defendant, on file in the records of this Court sent up from the Court below, the same having been identified as correct. (Record 646-648-663, 924, and map at 925.)

The law does not require that a hypothetical question should embody the theory of opposite counsel. It is only necessary that it be fair and fairly supported by the facts proven by the party asking it.

Western Coal M. Co. v. Berbrach, 94 Fed. 329-332;
2 Jones on Evidence, sec. 373.

(It now transpires, upon an examination of plaintiff's brief, that the point of the objection was that the witness was not qualified to express an opinion.)

As to that ground of the objection, namely, that the witness was not qualified to give an opinion, we call the Court's attention to the following facts testified to by the witness before said hypothetical question was put to him. He was an attorney-at-law; had something to do with investments, investing for people; the major part of his business was office business; had been engaged in it since 1876; he had been in business here; had followed it continuously and did a good deal of that business all over the country; he was very well acquainted with the lands at Pearl Harbor; was well acquainted with the value of

land about Pearl Harbor; he believed that he knew where the land sought to be condemned was situated and had been over it in parts; the boundaries had been pointed out to him. Without calling the Court's attention to further testimony showing qualification, it is submitted that the witness had shown ample qualification to testify. (Record, 649-652.)

In this connection and because there are a number of assignments of error based upon similar objections, we call the Court's attention to two authorities:

St. Louis K. & A. Ry. Co. v. Chapman, 16 Pac. Rep., 695, 697.

Montana R. R. Co. v. Warren, 137 U. S., 348-352.

The former holds that where there is no market value witnesses who have known the land for many years and have testified that they know the value of real estate in the vicinity will be permitted to testify to the value of the portion taken. The following language will be found on page 697:

"In Railway Co. v. Paul, 28 Kan., 821, Judge Brewer, "now Justice Brewer, speaking for the Court, says: "'While on the other hand the value of real estate, espe- "'cially in localities where there are few changes in "'property are not so absolutely certain, and cannot be "'determined with absolute exactness, and in respect to "'them the testimony of witnesses partakes largely of "'the nature of opinions, yet, from the necessities of the "'case, it has come to be recognized that such testimony "'is competent. It is the best, that in the nature of "'things, can be obtained; for a description by a witness "'of the locality of any given tract, its improvements and

" 'surroundings, would ordinarily throw little light upon " 'the question of its value. So many things enter into " 'and effect such value that a witness would be unable " 'to describe them all, or even to comprehend them all " 'fully. Hence it has become pretty generally estab- " 'lished that a witness who testifies that he is acquaint- " 'ed with the value of real estate in the locality may " 'give his opinion as to the value of any particular tract.' " See, also, Railroad Co. v. Stanford, 12 Kan., 380; Rail- " road Co. v. Allen, 24 Kan., 33."

From Montana R. R. Co. v. Warren, we beg to quote the following language found on pages 352 and 353:

" The assignments urged are three in number, first that " the verdict indicates passion and prejudice. Obviously " there is no foundation for this. If the testimony ad- " mitted by the trial court was competent, there was " ample foundation for the verdict. If the witnesses were " to be believed and their testimony was competent, the " verdict was not excessive; and the second of the three " points presented to the Supreme Court, which was that " the evidence was not sufficient to justify the verdict, " thus fails. There remains for consideration but a sin- " gle point—that there was admitted in evidence on the " trial the opinions of witnesses as to the value of land, " which were not based upon the sale of the same or " similar property, and were not therefore, the opinions " of persons competent to so testify. It appears that the " land taken was a strip running through a mining claim, " which had been patented and belonged to the defendant " in error. The claim adjoined the Anaconda mining " claim, which had been developed and worked, and dem-

"onstrated to contain a vein of great value. The claim
"in controversy had been developed so far as to indicate
"that possibly, perhaps probably, the same rich vein ex-
"tended through its territory. It had not been devel-
"oped so far that this could be affirmed as a fact proved.
"The strip taken ran lengthwise through the claim; and
"upon the trial, witnesses were permitted to testify as
"to their opinion and judgment of its value. It may be
"conceded that there is some element of uncertainty in
"this testimony; but it is the best of which, in the nature
"of things, the case was susceptible. That this mining
"claim, which may be called 'only a propect' had a value
"fairly demoninated a market value, may, as the Supreme
"Court of Montana well said, be affirmed from the fact
"that such 'prospects' are the constant subject of barter
"and sale. Until there has been full exploiting of the
"vein its value is not certain, and there is an element of
"speculation, it must be conceded, in any estimate
"thereof. And yet, uncertain and speculative as it is,
"such 'prospect' has a market value; and the absence
"of certainty is not a matter of which the Railroad
"company can take advantage, when it seeks to enforce
"a sale. Contiguous to a valuable mine, with indications
"that the vein within such mine extends into this claim,
"the railroad company may not plead the uncertainty in
"respect to such extension as a ground for refusing to
"pay the full value which it has acquired in the market
"by reason of the surroundings and possibilities. In
"respect to such value, the opinions of witnesses familiar
"with the territory and its surroundings are competent.
"At best, evidence of value is largely a matter of opinion

" especially as to real estate. True, in large cities, where " articles of personal property are subject to frequent " sales, and where market quotations are daily published, " the value of such personal property can ordinarily be " determined with accuracy; but even there, where real " estate in lots is frequently sold where prices are gen- " erally known, where the possibility of rental and other " circumstances affecting values are readily ascertain- " able, common experience discloses that witnesses the " most competent often widely differ as to the value of " any particular lot; and there is no fixed or certain " standard by which the real value can be ascertained. " The jury is compelled to reach its conclusion by com- " parison of various estimates. Much more so is this true " when the effort is to ascertain the value of real estate " in the country, where sales are few, and where the ele- " ments which enter into and determine the value are so " varied in character. And this uncertainty increases as " we go out into the newer portions of our land, where " settlements are recent and values formative and specu- " lative. Here, as elsewhere, we are driven to ask the " opinions of those having superior knowledge in respect " thereto. It is not questioned by the counsel for plain- " tiff in error that the general rule is that value may be " proved by the opinion of any witness who possesses " sufficient knowledge on the subject, but their contention " is, that the witnesses permitted to testify had no such " sufficient knowledge. It is difficult to lay down any " exact rule in respect to the amount of knowledge a " witness must possess; and the determination of this " matter rests largely in the discretion of the trial judge." (137 U. S., 352-353.)

It is submitted that there is no error in the ruling of the Court allowing the witness to testify to his opinion as to the market value of defendant's leasehold interest.

ASSIGNMENTS NUMBERED 27, 28, 29 and 30.

These assignments are on all fours with assignment number 26, except as to the qualifications of the several witnesses.

The witness Goodale (Assignment No. 27, Record 840, 657) qualified as follows: He resided at Waialua, on the Island of Oahu (being the same island upon which the land sought to be condemned is situated); was manager of the Waialua Agricultural Company and had been for a little over three years; that company had 9,000 acres planted in the District of Waialua on said island; the witness had had twenty-three years experience in the growth and manufacture of sugar in the Islands, and was familiar with agricultural lands on said island. He thought he knew the value of agricultural lands on said island; he had seen the land that the government was seeking to condemn; had been there in October, 1901; he went over the land with a party who took men along to dig holes to show the quality and depth of soil. (Record 657-658.)

It is submitted that the witness had shown qualifications sufficient in the discretion of the Court to enable him to give an opinion as to the value.

The qualifications of the witness Renton (Assignment No. 28, Record 842, 663) were as follows: He resided at Ewa Plantation, on the same island upon which the Honolulu Plantation is situated; he was a plantation manager, and had been such for about eighteen years; he had

been manager of Ewa Plantation for three years and four months; the Honolulu Plantation was situated on the east side of Pearl Lochs, and the Ewa Plantation on the west side, several miles apart,—four or five miles—possibly six miles; had been in the business of the growth and manufacture of sugar for twenty-four years; had given it all the attention he could, it was his livelihood; he knew the land that the United States was seeking to condemn by the proceedings in question, and knew where it was situated; he visited the land but could not remember the exact date, some time during the latter part of the last year; he thought he knew the value of agricultural lands about Pearl Harbor Lochs. (Record 663-664.)

It is submitted that the witness had shown sufficient qualifications to enable him to give an opinion as to the value of defendant's leasehold interest, sought to be condemned by the government.

The witness Meyer (Assignment No. 29, Record 844, 668) qualified as follows: He lived at Waianae; was manager of the Waianae Sugar Company, a sugar plantation; had been the manager for three years; had been engaged in the sugar industry for twenty-two years; had given the growth and manufacture of sugar considerable attention; knew the value of agricultural land around Ewa Basin and leasehold interests therein; knew the land that the government was seeking to condemn by this proceeding; had visited the land in October last; went down to see what the soil was like, to examine the soil; there were holes dug at intervals, and the depth of the soil was taken; he was making an inspection. (Record 667-668.)

It is submitted that the witness showed sufficient qualifications to allow of his opinion being taken.

The witness Ahrens (Assignment No. 30, Record 845, 670) qualified as follows: He resided at Waipio; was manager of the Oahu Sugar Plantation; had been manager of Oahu for five years; formerly of Waialua; had been engaged in the sugar business in the islands for nearly twenty years; had been sugar boiler, overseer and manager, had a practical knowledge of it in all branches; knew the land that the government was seeking to condemn; had visited it several times about two years ago and in October of the preceding year; knew the value of leasehold interests in and about Pearl Harbor Lochs; thought he would know the value of the leasehold interest of the land in question if its terms should be stated to him. (Record 670, 671.)

It is submitted that the witness had shown sufficient qualifications to enable him to give his opinion as to the value of the defendant's leasehold interest in the land sought to be condemned by the government and that there was no error in any of the rulings complained of.

ASSIGNMENT NUMBER 31.

(Record 847, 673.)

This assignment is based upon an objection to the following question asked by counsel for defendant of J. T. Crawley, a witness called by defendant: "What do you "know about the productive capacity of the soil of this "land?" (Referring to the land sought to be condemned.) The grounds of the objection were that the question was

"immaterial and incompetent, that it called for a mere "speculation, and was without foundation upon which "any reasonable person could base an opinion." The Supreme Court in the Monongahela case, 148 U. S., 328, answering the question, how can just compensation be determined, says: "The value of property, generally speak- "ing, is determined by its productiveness—the profit "which its use brings to the owner. Various elements "enter into this matter of value. Among them we may "notice these: Natural richness of the soil as between "two neighboring tracts—one may be fertile, the other "barren; the one so situated as to be susceptible of easy "use, the other requiring much labor and large expense "to make its fertility available."

The witness Crawley was called because he was one of the best qualified persons in the Territory to testify to the productive capacity, "the natural richness of the soil" of the land sought to be condemned. His qualifications were as follows: He was a chemist and manufacturer of fertilizer, a graduate of Harvard University; his practical experience included three years at the Louisiana Experimental Station, one year at Washington in the United States Department of Agricultural, and three years at the Hawaiian Experimental Station as Assistant Chemist and Assistant Director; and he had been three years in present position; he had seen almost all of the plantations, and had been over the greater portion of them, and had seen land of all descriptions; he knew the productive capacity of the cane land on the island; he had examined the land sought to be condemned, and knew where it was; he made what he considered a thor-

ough examination by going over it and seeing holes dug and examining the soil, and also made a chemical examination of the sub-soil, believing it would enable him to form an estimate as to its value as a cane producer. (Record 672, 673.) Thereupon the question objected to was asked, namely: "What do you know about the pro-"ductive capacity of the soil of this land?" (Meaning the land sought to be condemned.) The witness answered the question as follows: "The soil is very well adapted "to the growing of cane; it is good soil; the chemical "composition of it is good and compares favorably with "other soil in the vicinity that is raising good crops of "sugar." (Record 673.) An expert witness may base his answer to questions put to him upon his own knowledge. It is not necessary that he should detail all of the facts and circumstances that enter into the forming of his opinion. See opinion of Judge Brewer in Railroad Company v. Paul, 28 Kansas, page 821, quoted above.

It is submitted without further comment that there was no error in the ruling complained of.

ASSIGNMENT NUMBER 32.

(Record 847-678.)

Assignment number 32 is on all fours with assignments of error numbered 26, 27, 28, 29 and 30, the same hypothetical question put to the other witnesses was asked of the witness James F. Morgan, who qualified as follows: He resided in Honolulu and was an auctioneer; had resided in this country some thirty odd years; had been in business as auctioneer for himself for about sixteen or seventeen years; had been employed at same place for

nine years previous to that; his business pertained to nearly everything that comes to auctioneers, and included both real estate and merchandise; he testified that he could form an estimate of the value of real estate and leasehold interests throughout the island; he knew the value of land both in the Ewa Basin and at Pearl Harbor, where the land in question was situated; he knew the land sought to be condemned by these proceedings, and had visited it two or three months preceding said trial; he had walked and rode over it; he had studied over the matter of value of the leasehold interest of the defendant in the land sought to be condemned and had formed an estimate of that value. (Record 677-678.)

Thereupon the question objected to was asked of him.

It is submitted that he had qualified.

ASSIGNMENT NUMBER 33.

(Record 849, 680.)

This assignment is based upon an exception taken to the ruling of the Court upon an objection to the following question asked of the same witness by counsel for defendant on re-direct examination: "How many mills are there "in the vicinity of this land?" The answer was: "There "is the Honolulu Plantation Company's mill on right ad- "jacent land to this; the Oahu Mill a little further on; "then comes the Ewa and the Waialua. I cannot say "positively how far the Honolulu Mill is from this place, "but it looks to me it was within, I should say, about two "miles. I do not know how far away the Oahu Mill is." Manifestly the existence of three mills in the vicinity of this land would bear upon its value in the market, and as

the Court had intimated that that was to be the test which he would apply when he instructed the jury, it was defendant's right to show the existence of the neighboring sugar mills.

ASSIGNMENT NUMBER 34.

(Record 850, 682.)

This assignment is on all fours with assignments numbered 26 to 30 and 32. The question was put to L. A. Thurston, who had qualified as follows: He resided in Honolulu, had resided there all his life; was variously occupied, principally in the sugar business at the present time; had been interested in the sugar business for the last twenty years; had always been around and connected with people interested in the sugar business; had practical experience in the sugar plantations; was manager of the Wailuku in 1879 and 1880, and accompanied the promoters of the Ewa, the Oahu and the Waialua Plantations at the time they were investigating those lands with a view of making the plantations; had been for the last three years devoting most of his time to sugar enterprises on Maui and Hawaii, in connection with Kihei and Olaa plantations; had made a study of the question of value of cane land, and for eighteen months or two years had made a special study for the purpose of drawing up planters' contracts in connection with the plantations in which he was interested; he knew the land that was sought to be condemned by the government by these proceedings; had been down there and over the land a number of times, more recently since litigation took place, a month or so before the trial. (Record 680-682.)

It is submitted that the witness had sufficiently qualified to express an opinion.

ASSIGNMENT NUMBER 35.

(Record 851, 684.)

This assignment stands on the same footing as assignment No. 31; the witness expressed the opinion that he considered the soil on the land sought to be condemned first-rate cane land.

ASSIGNMENT NUMBERS 36 and 37.

(Record 852-3, 685.)

These assignments are covered by the discussion under assignment No. 21.

ASSIGNMENT NUMBER 38.

(Record 854, 705.)

This assignment, together with assignments numbered 39 to 45 inclusive, are taken to the alleged refusal of the Court to give instructions requested by plaintiff.

Plaintiff seems to have abandoned these assignments of error. All that is said about them in plaintiff's brief is as follows: "Instructions asked for should have been given as asked, when correctly drawn." (Plaintiff's Brief, page 184.)

Even a casual examination will disclose that the Court charged the jury strongly in favor of the plaintiff. Not only this, but it will also be found that the language used by the Court, and much of that contained in the requested instructions, the refusal to give which counsel has assigned as error, is substantially identical. See Plaintiff's requests, Record, pages 436-442. Defendant's requests, Record, pages 443-448. Charge of Court, Record, pages 421-435.

The first sentence of the request, the refusal to give which is the basis of the above assignment of error proceeds as follows: "I instruct you that private property "cannot be taken for public use without just compensa- "tion." (Record, 705.) The Court embodied in its charge the following language: "I charge you that private prop- "erty cannot be taken for public use without just com- "pensation." (Record 716.)

The second sentence of the requested instruction is as follows: "These are the words of our fundamental law, "the Federal constitution, and from them you will ob- "serve that the compensation must be just." (Record 705.) The Court charged the jury as follows: "This is the lan- "guage of our fundamental law, the Federal constitu- "tion. (Article 5 of the Amendments to the Constitution "of the United States.)" (Record 716.)

"In this behalf I charge you also that the leasehold in- "terest of the defendant, the Honolulu Plantation Com- "pany, is property and that the said defendant is enti- "tled to receive 'just compensation' for its taking." (Record 716.)

The third sentence of the requested instruction is as follows: "In this behalf I charge you that it is your duty

"to treat both sides of this case with equal fairness and "impartiality, and to avoid giving to any one side any "preference or advantage denied to the other."

The Court charged as follows: "I further charge you "that it is your duty to treat both sides with equal fair- "ness and impartiality, in arriving at a conclusion on a "question on compensation. You are not to give to any "one side preference or advantage denied to the other." (Record 716.)

The fourth sentence of the requested charge is as follows: "In other words, when dealing with this matter of "compensation, you are to remember that just compen- "sation means compensation that is just to both sides, "just in regard to the public as well as to the indi- "vidual."

The Court's charge was as follows: "And in assessing "this 'just compensation,' it is your duty to see that it "is 'just compensation,' not merely to the individual "whose property is taken, but to the public who is to pay "for it." (Record 716.)

The fifth sentence of the requested instruction was as follows: "You are not, for instance, to place an unduly "depreciative valuation upon this property because the "government desires it; nor should you place an exag- "gerated valuation upon the property either because it "is private property or because the government may "want it."

The Court charged the jury as follows: "You are not "to give to any one side preference or advantage denied "to the other. For instance, you are not to place an un- "duly depreciative valuation upon this leasehold inter-

"est because the United States wants it, nor should you "place an exaggerated valuation upon the property "because the government wants it." (Record 716.)

The sixth sentence of the instruction was as follows: "Your province is to proceed and act throughout with "even-handed fairness and impartiality, treating both "sides alike, and deciding disputed questions solely upon "the evidence received and within the lines laid down by "this charge." The Court charged the jury as follows: "And the Court reminds you that you are to be the sole "judges of the weight and truthfulness of all of the evi- "dence introduced herein, but you are to take the law "from the Court." The Court also along the same lines used the following language: "If in the course of this "trial the Court has by word or expression appeared to "favor one side or the other, it is not intended, it is the "duty of the Court and it is its aim and it should be the "duty of the jury to do absolute justice between the par- "ties in this, as well as in all other actions, and you are "simply to take the law from the Court and confine your- "selves solely to a consideration of the testimony pro- "duced in the case in arriving at a verdict without limit- "ing your consideration to any isolated portion of the "testimony, but considering it as a whole, fairly weigh- "ing all the testimony, both the direct and indirect evi- "dence with all reasonable inference to be drawn there- "from." (Record 716-717.)

It is submitted that there was no error prejudicial to the government in view of the language used by the Court in its charge in refusing to give the instruction requested by plaintiff in the very language in which plain-

tiff had requested it. It is not necessary that instructions be given in the identical language asked for by counsel if the substance thereof is covered by the charge of the Court. This has been many times decided by the Supreme Court. Ayers v. Watson, 137 U. S., 584, 600, 601.

ASSIGNMENT NUMBER 39.

(Record 855, 706.)

This assignment relates to the alleged refusal of the Court to give an instruction requested by counsel for plaintiff. The first three sentences of said requested instructions are as follows: "I instruct you that whenever "private property is taken for public use, the fair mar- "ket value of the property at the time of the taking "should be paid for it; and according to the Statute of "this Territory the actual value of the property at the "time of the summons is designated as the measure of "valuation of all property to be condemned; and I "charge you that the date of the summons in this case is "July 6th, 1901. It is to this date, therefore, that you "are to look in fixing the value of the property involved "in this case. You are to remember that the material "matter for consideration is the actual condition of the "property as it stood on that date." (Record 706.)

Thus far the Court gave the instruction word for word. (Record 718-719.) The next sentence requested was: "It "is to this that you are limited, and beyond this you can- "not go." But the Court gave the first part and dropped out the last; possibly on the ground that it was redundant. The rest of the requested instruction is as follows: "The prospective or speculative value of the land from

"possible improvements, or prospective uses, cannot be "considered by you; the value must be actual, and not "speculative or mere possible value, nor argumentative "value. It is not therefore proper to consider how the "property might be improved, or the cost of such im- "provements; nor can you consider what the probable "value of the land would be if this or that improvement "were placed upon it; nor can you consider the intention "of the lessee to make such improvements, even though "you should find any such intention to exist. In brief, you "are to limit your consideration to the actual condition "of this property as it actually stood on July 6th, 1901." (706-707.)

In regard to this part of the request we beg to call the Court's attention in the first place to the record, which will disclose that there was nothing whatever in the case to justify the use of any such language, and in the second place, the Court, in charging the jury, in addition to giving the first portion of the request, used the following language: "I have told you that the fair market value "of the property (I have not as yet but will) as that prop- "erty actually stood on July 6th, 1901, should be paid "for it; **and in this behalf I charge you that what this "property would bring at a fair public sale, where one "party wants to sell and another wants to buy may be "taken as a criterion of its market value.** But you must "understand that compensation is to be estimated in "this case by the actual legal rights acquired by the gov- "ernment and not by the use which the government may "make of those rights. * * * I further instruct you "that the actual value of this property cannot be en-

"hanced by reason of the projected improvements for "which it is taken; for this would simply be to make the "government pay for an enhancement caused by its own "work. And, moreover, the willingness or unwilling- "ness of the Honolulu Plantation Company to part with "this property is not an element of value; nor can you "consider what the Honolulu Plantation Company would "give rather than be deprived of this property. **As I have "heretofore said, you will understand in determining "compensation, limit your attention to the market value "as it actually stood on July 6, 1902, and be guided "solely by that."** * * * (Record, 717-718)

"In placing a valuation upon this leasehold interest "you cannot consider the mere speculative or possible "value of sugar that might be produced in the future on "this land. This is too remote and uncertain, and can "form no just basis for a just valuation. The amount "of sugar which it is claimed can be produced on this "land is purely speculative; as the amount of such sugar "crop would depend on many conditions such as the char- "acter and amount of fertilizer used, the amount of "water, the manner of cultivation, the depth and richness "of the soil, and many other elements which necessarily "must enter into the problem of a crop which might be "produced in any one year or series of years. But you "may consider what the land is best suited for, and the "defendant is entitled to a just compensation for its "leasehold interest in these lands for any purpose for "which it may reasonably be used; and if from the evi- "dence you shall find that the defendant had any im- "provements on that portion of the land covered by the

"leasehold interest of the defendant, and which is sought "to be condemned by the United States, which were there "prior to the 6th day of July, 1901, you are to find the "value of the user of such improvements to the defend- "ant for the remaining portion of the term of the leases, "separate and distinct from the value of the leasehold "interest itself in said lands. * * * I further in- "struct you that you are not to consider in this case the "cost of construction of the value of the sugar mill, the "pumping stations, or any of the machinery belonging "to the defendant, if said sugar mill, pumping station or "machinery were not constructed or standing upon the "561.2 acres of land sought to be condemned by the gov- "ernment at the time of this action, to-wit, July 6, 1901." (Record 719-720.)

"**You are to bear in mind that the object of this trial "is to find out what was the fair market value of the "leasehold interest of the Honolulu Plantation Company "in the 561.2 acres of land sought to be condemned by "the United States on July 6, 1901.** This may be shown "by the usual and common means adopted for such pur- "pose, and no mere speculative valuations are to be con- "sidered by you. You have the right and it is your duty "to consider all the elements of value affecting this land "and the leasehold which is sought to be condemned "therein by plaintiff; and it is also your duty to consider "that this land is not now appropriated to any valuable "use; that it is not now producing a crop. You will in "assessing the damage have a right to take into consid- "eration all the elements of a lack of value as you do all "the elements of value. **The Court further instructs you**

"that the value of a leasehold is its actual market value "over and above the amount of rent of the land leased "and the taxes, if the lessee has to pay the taxes." (Record 723.)

It is submitted that counsel's requested instruction was amply covered by the Court, certainly in so far as there was any evidence tending to justify the language used.

ASSIGNMENT NUMBER 40.

(Record 856-707.)

The first paragraph of Assignment No. 40 is as follows:

"Some evidence has been introduced by the govern- "ment showing certain valuations, sworn to, and filed "with the Assessor pursuant to the requirements of the "Territorial Statute in that regard. Upon this subject "I charge you that such sworn returns to the Assessor "are called by the law admissions against interest; and "you may, therefore, and indeed it is your duty to do so, "consider such sworn returns along with the other evi- "dence in the case bearing upon the question of market "value." (707.)

The Court charged the jury as follows:

"You are further instructed that unquestioned written "admissions are among the strongest testimony which "can be introduced tending to show any given state of "facts, and the Court reminds you that some evidence "has been introduced by the government tending to show "certain valuations of this leasehold interest sworn to by "the defendant through its manager, Mr. Low, before "the commencement of these proceedings, to-wit: certain

" tax returns filed with the Assessor pursuant to the laws " of the Territory of Hawaii. Such sworn returns made " by the representative of the defendant to the Assessor " are admissions against interest, and are competent evi- " dence tending to show what the defendant then be- " lieved the value of the property to be. You may there- " fore consider such returns along with the other evi- " dence in the case, upon the question of value of this " property and give it such weight as you may deem just." (Record 721-722.)

An examination of the returns referred to will disclose that they were not entitled to be considered as admissions at all. The oath was not that the valuations therein set forth were true. It was of a very special and limited nature. (Record 568-575 and Exhibits, Vol. IV of Record.) But if they were admissions as to the value of this piece of property, this leasehold interest, the plaintiff had no cause of complaint because of the language used by the Court.

The second paragraph of the instruction was as follows:

" In this connection I charge you that the government " has introduced here a certain writing of the Honolulu " Plantation Company, making an annual exhibit of its " affairs, and showing the assets of the defendant on Jan- " uary 1, 1901, I charge you that such writing and exhibit " comes within the rule just stated concerning admissions " against interest, and that it is your duty to consider " such writing and exhibit in connection with the other " evidence in the case bearing upon the question of mar- " ket value." (707.)

What the Court charged the jury was as follows:

"So also as to certain other written evidence intro-
"duced by the government tending to show the value of
"the real property of the defendant, and which includes
"the leasehold interest of the defendant in this land
"sought to be condemned. As is provided by Section
"2076 of the Civil Laws of the Territory of Hawaii. The
"defendant being a foreign corporation through its Sec-
"retary, Mr. Sheldon, about six months prior to the com-
"mencement of this suit, filed with the Treasurer of the
"Territory on or about the first day of January, 1901, that
"statement as required by the Territorial law. This
"statement is also admitted in evidence as a statement
"against interest, and you are to give to it such weight
"and significance as to you may seem proper." (722.)

It is submitted that the plaintiff was not prejudiced by the charge given as an inspection of the papers referred to will fully disclose.

ASSIGNMENT NUMBER 41.

(Record 857, 708.)

This request is in the following language:

"You have been permitted to view the premises in ques-
"tion. The object of this view was to acquaint you with
"the physical situation, condition and surroundings of
"the premises, and to enable you to better understand
"the evidence on the trial. The knowledge which you
"acquired by the view may be used by you in determin-
"ing the weight of conflicting testimony respecting value
"and damage, but no further. Your final conclusion
"must rest on the evidence here adduced." (708.)

The Court in its charge used the following language:

"Gentlemen of the jury, during the trial you visited "the lands sought to be condemned. The object of such "visit was that you might familiarize yourselves with the "nature and extent of the land and its physical char- "acteristics and conditions, so as to better enable you "to understand the evidence on the trial of the case. The "knowledge so acquired may be used by you in determin- "ing the weight of conflicting testimony respecting the "value of the leasehold interest in these lands, but not "otherwise." (Record 721.)

It is submitted that the request is covered by the charge.

ASSIGNMENT NUMBER 42.

(Record 857.)

The requested instruction was in the following language:

"In cases of this character much of the testimony con- "sists in expressions of opinion touching the subject- "matter involved. It is your province to weigh the testi- "mony of the witnesses whose opinions have been given, "by a reference to the whole situation of the property "and its surroundings, and all the attendant circum- "stances, and by applying to it your own experience and "general knowledge. The evidence of experts as to "values and damages does not differ in principle from "the evidence of experts upon other subjects. So far "from laying aside their own general knowledge and "ideas, the jury may apply that knowledge and those "ideas, to the matters of fact in evidence in determining

"the weight to be given to the opinions expressed. While "the jury cannot act in any case upon particular facts "material to its disposition resting in their private "knowledge, but should be governed by the evidence ad- "duced they may and should judge of the weight and "force of that evidence by their own general knowledge "of the subject of inquiry; and while the law permits the "opinions of those familiar with the subject to be given, "such opinions are not to be blindly received, but are to "be intelligently examined by the jury in the light of "their own general knowledge, giving them force and "control only to the extent that they are found to be "reasonable. In other words you are not bound by the "opinions of experts, but you will take their testimony "into consideration, along with all other evidence in the "case, and award to it such value as in your judgment it "deserves." (708.)

The Court charged the jury in this behalf as follows:

"Most of the evidence introduced by the defendant in "this case as to the value of these leaseholds was expert "testimony, namely the opinions of witnesses given in "answer to hypothetical questions propounded to them; "and while great weight should always be given to the "opinions honestly expressly and fairly given of those "persons familiar with the subject yet you are not bound "by such expert opinons, but they are to be intelligently "examined by you in the light of your own personal "knowledge and experience giving force and control only "to the extent that they are found to be reasonable and "in view of all the other testimony presented in the case. "And while the jury cannot in any case act under par-

"ticular facts material to its disposition, which rest "solely within their private knowledge, but should be "governed by all the evidence adduced, yet they should "judge of the weight and force of that evidence by their "own general knowledge on the subject. In a word the "jury is not bound to give weight to testimony which is "contrary to what every person of good sense and or-"dinary intelligence knows to be true." (Record 456.) (720-721.)

It is submitted the plaintiff was not prejudiced by the modification made by the Court, and that the charge as given by the Court was more favorable than that which he asked for.

ASSIGNMENT NUMBER 43.

(Record 858, 709-710.)

This request was in the following language:

"In determining upon which side the preponderance "of evidence is you are not to be controlled by the mere "number of witnesses produced, upon either side, but "you should take into consideration, the opportunities "of the several witnesses for seeing or knowing the "things about which they testified, their conduct and "demeanor while testifying, their interest or lack of in-"terest, if any, in the result of the suit, the probability or "improbability of the truth of their several statements "in view of all the other evidence adduced or circum-"stances proved on the trial, and from all the circum-"stances determine upon which side is the weight or pre-"ponderance of the evidence. In dealing with the testi-"mony you must not forget by whom it was given, the

" motive of the particular witness, if any, attributable to " him. Indeed any fact or circumstance by which his un- " biased utterance of truth might be impeded or prevent- " ed, altogether must receive your attention. Thus you " would not, as men of sense, so readily yield to the testi- " mony of a witness, whose partiality is known or observ- " able, as you would have done had the same witness been " wholly indifferent between the parties, and with no par- " tisian motive to actuate him—no interest in the result " of the trial other than the general interest which every " good citizen ought to feel, that in this, as in all other " trials, justice be done according to law."

The Court's charge to the jury, which we submit was all that plaintiff was entitled to have given and contained the substance of the generalities of the latter part of the request is as follows:

" The Court further instructs you that you are to reach " a final conclusion in this case by a preponderance of the " evidence which is not meant gentlemen, the evidence " given by the greater number of witnesses, but the " superior strength of certain evidence and the greater " weight which that evidence may in your judgment be " entitled. In weighing the testimony you should take " into consideration the opportunities of the witnesses " for seeing and knowing the things about which they " testify and especially so when testifying as experts as " to the value and also their interest or lack of interest " in the result of the action, the probability or the im- " probability of the truth of their several statements and " the reasonableness of their opinions when testifying as " experts and from all the circumstances you are to de-

" termine on which side the weight or preponderance of " the evidence rests." (722-723.)

ASSIGNMENT NUMBER 44.

(Record, 859-711.)

The request, the refusal to give which is the basis of this assignment, is in the following language:

" At arriving at a verdict in this case, you are to " give to the testimony such weight and effect as in your " judgment it deserves, but you should not treat with " such testimony arbitrarily or capriciously, nor should " you limit your consideration to any isolated or frag- " mentary part thereof. On the contrary you are to take " into consideration all the evidence in the case, both " direct and circumstantial, together with all reasonable " inference to be drawn from that evidence."

The Court covered this in different portions of the charge, we call the Court's attention to the following:

" In conclusion let me say to you that the evidence in " this case is very conflicting without commenting upon " the testimony of any witness I instruct you that in con- " sidering the testimony of all of the witnesses in this " case you may accept such portions thereof as you may " believe to be true or reject such portions thereof as " you may believe to be false, if the statements of any " one or more witnesses are so unreasonable or improba- " ble as that upon their face they do not carry conviction " of their truth to your minds, you are at liberty to reject " all or any part thereof." (725.)

ASSIGNMENT NUMBER 45.

(Record, 860, 711.)

This request was in the following language:

"In considering and deciding the facts in this case, I "charge you that the property sought to be condemned "herein is the leasehold interest of the Honolulu Planta- "tion Company in and to 561.2 acres of land and nothing "more. In passing upon the facts, you will bear this con- "stantly in mind."

The Court charged the jury in regard to this matter as follows:

"It is the value of these leasehold interests in these "561.2 acres of land that you are to estimate." (715.)

"I have told you that the fair market value of the "property as that property actually stood on July 6th, "1901, should be paid for it." (717.)

"As I have heretofore said you will understand in "determining compensation limit your attention to the "market value as it actually stood on July 6th, 1901, and "be guided solely by that." (718.)

"It is to this date therefore that you are to look in "fixing the value of the leasehold interest involved in "this case, you are to remember that the material con- "sideration is the actual condition of the leasehold inter- "est on that date. It is to this that you are limited." (719.)

"And if from the evidence you shall find that the de- "fendant had any improvements upon that portion of "the land covered by the leasehold interest of the defend- "ant and which is sought to be condemned by the "United States which was there prior to the 6th day of

"July, 1901, you are to find the value of the user of such "improvements to the defendant for the remaining por- "tion of the term of the leases, separate and distinct from "the value of the leasehold interest itself in said lands." (719.)

"I further instruct you that you are not to consider in "this case the cost of construction or the value of the "sugar mill, the pumping stations or any of the machin- "ery belonging to the defendant, if said sugar mill, "pumping station or machinery were not constructed or "standing upon the 561.2 acres of land sought to be con- "demned by the government at the time of this action, "to-wit, July 6th, 1901." (720.)

"You are to bear in mind that the object of this trial "is to find out what was the fair market value of the "leasehold interest of the Honolulu Plantation Com- "pany in the 561.2 acres of land sought to be condemned "by the United States on July 6th, 1901." (723.)

"You must therefore find for the plaintiff a verdict "condemning the leasehold interest of the defendant, the "Honolulu Plantation Company, in and to the 561.2 acres "of land, desired by the government; and you must find "a verdict in favor of the defendant for the amount of "the compensation which from all the testimony you "shall deem just." (725.)

"You may take these instructions with you when you "retire, if you wish to."

We submit that the Court made it clear to the jury that the property sought to be condemned was the leasehold interest of the Honolulu Plantation Company in and to 561.2 acres of land.

ASSIGNMENT NUMBER 46.

(Record 860-861, 729-730.)

Assignment No. 46 purports to be based upon exception No. 47, set out in the bill of exceptions. Exception No. 47 is as follows: "1. That said verdict is excessive, "in this, that it attempts to award excessive, unreason- "able and inconsistent compensation. 2. That said ver- "dict is contrary to and against the law and the evidence "herein. 3. That said verdict is not sustained or justi- "fied by either the law or the evidence herein, and that "said evidence is insufficient to justify said verdict. 4. "That said verdict is contrary to and against the charge "of the Court herein." (Record, page 729-730.)

The alleged grounds of the exception set forth in the *assignment of errors* are simply a repetiton of the grounds set forth in the motion for a new trial, and an attempt to obtain a review of the decision of the lower Court on motion for a new trial in this Court indirectly when counsel has found that he cannot do so directly.

The exception cannot be considered under the rulings of the Supreme Court and the Circuit Courts of Appeal.

Such a re-examination of the verdict of a jury was unknown to the rules of the common law, and is expressly forbidden by the Seventh Article of the Amendments to the Constitution of the United States.

This has been the settled law ever since the decision in Parsons v. Bedford, 3 Peters, 447, 448, where the following is contained: "The only modes known to the common "law to re-examine such facts was the granting of a new "trial by the Court where the issue was tried, or the "award of a venire facias de novo, by the appellate

"Court, for some error of law that had intervened in the "proceedings."

See also The Justices v. Murray, 9 Wall., 278.

The latter case is authority also for the proposition that the latter part of the amendment and the prior part are separable, and that the provision to the effect that no fact tried by a jury shall be re-tried is a substantial and independent clause and a prohibition to the courts of the United States against re-examining any fact tried by a jury in any other manner.

It is immaterial whether we were entitled under the Constitution to a jury in this cause or not, the fact of compensation having been tried and determined by a jury is not reviewable in this Court except for error in the record.

The authorities sustaining the proposition quoted from the above will be found fully set out under the respective case in Rose's Notes.

See Volume 3, page 86.

See Volume 7, page 175.

The two cases are quoted with approval and the principle therein applied to a verdict entered by a jury in a condemnation suit in the State Court of Illinois, and it was held that the fact that the Federal Constitution does not require the determination of the question of compensation by a jury does not in any way effect the application of the latter clause of the seventh amendment, namely, that an issue of fact so tried might not be otherwise re-examined than according to the course of the common law, which was as there stated either by a new

trial granted by the trial court or an award of a venire facias de novo by an appellate court for some error of law intervening in the record.

See Chicago, Burlington, etc., Road v. Chicago, 166 U. S., 242, 243-246.

This is an opinion of the Supreme Court on a writ of error sued out to review the record in a condemnation suit instituted by the City of Chicago against the Chicago, Burlington & Quincy Railroad Co.

The Court through Mr. Justice Harlan uses the following language, which will be found at page 242:

"Whatever may have been the power of the trial court "to set aside the verdict as not awarding just compensa- "tion, or the authority of the Supreme Court of Illinois, "under the constitution and laws of that State, to review "the facts, can this Court go behind the final judgment of "the State Court for the purpose of re-examining and "weighing the evidence, and of determining whether "upon the facts, the jury erred in not returning a verdict "in favor of the railroad company for a larger sum than "one dollar? This question may be considered in two "aspects: First, with reference to the seventh amend- "ment of the constitution providing that 'in suits at com- "'mon law, where the value in controversy shall exceed "'twenty dollars, the right of trial by jury shall be pre- "'served, and no fact tried by a jury shall be other- "'wise re-examined in a Court of the United States "'than according to the rules of the common law'; sec- "ond, with reference to the statute (Rev. Stat., sec. 709) "which provides that the final judgment of the highest

"court of a State in certain named classes may be re-ex-
"amined in this Court upon writ of error."

We would here call the Court's attention, by way of parenthesis, to Luxton v. North River Bridge Co., 147 U. S., 337, holding that the action of the Circuit Court in condemnation proceedings, as in other cases on the common law side of the Court was reviewable by the Supreme Court *only by writ of error.* Indeed, it is by writ of error that the plaintiff brings the record of the Court below before this Court for review.

Again referring to the opinion in Chicago Railroad Co. v. Chicago we would call the Court's attention to the following:

**"One of the objections made to the acceptance of the "constitution as it came from the hands of the conven-
"tion of 1787 was that it did not, in express words, pre-
"serve the right of trial by jury, and that, under it, facts
"tried by a jury could be re-examined otherwise than
"according to the rules of the common law. The sev-
"enth amendment was intended to meet these objections
"and deprive the courts of the United States of any such
"authority."**

After referring to Justices v. Murray, 9 Wall., 274-278, and pointing out that it was there held that Congress could not authorize a re-trial of facts in a case tried by a jury the court continues:

"Upon the reasoning in the case just referred to, it
"would seem to be clear that the last clause of the sev-
"enth amendment forbids the retrial by this Court of
"the facts tried by the jury in the present case.

"This conclusion is not affected by the circumstance
"that this proceeding is to be referred to the State's

"power of eminent domain, in which class of cases it has "been held that, in the absence of express constitutional "provisions on the subject, the owner of private prop- "erty taken for public use cannot claim, as of right, that "his compensation shall be ascertained by a common law "jury. * * *

"The persons impanelled in this case to ascertain the "just compensation due the railroad company consti- "tuted a jury as ordained by the constitution of Illinois "in cases of the condemnation of private property for "public use, and, being a jury within the meaning of the "seventh amendment of the Constitution of the United "States, the facts tried by it cannot be retried 'in any "'Court of the United States otherwise than according "'to the rules of the common law.' The only modes "known to the common law 'to re-examine such facts "'are the granting of a new trial by the Court where the "'issue was tried, or to which the record was properly "'returnable, or the award of a venire facias de novo by "'an Appellate Court, for some error of law which inter- "'vened in the proceedings.' Parsons v. Bedford, 3 Pet. "433, 447, 448; Railroad Company v. Fraloff, 100 U. S., "24, 31."

"To this," the opinion continues, "may be added that "Congress has provided that the final judgment of the "highest court of a State in cases of which this Court "may take cognizance shall be re-examined upon writ of "error, a process of common-law origin, which removes "nothing for re-examination but questions of law arising "upon the record. Egan v. Hart, 165 U. S., 188. Even "if we were of opinion, in view of the evidence, that the

"jury erred in finding that no property right of a sub-
"stantial value in money, had been taken from the rail-
"road company, by reason of the opening of street across
"its right of way, we cannot, on that ground, re-exam-
"ine the final judgment of the State Court. We are per-
"mitted only to inquire whether the trial court pre-
"scribed any rule of law for the guidance of the jury that
"was in absolute disregard of the company's right to just
"compensation." 166 U. S., 243-246.

As already pointed out, the proceedings had in the Court below come before this court upon writ of error, and are governed by the rule of law applicable to that writ.

THE SO-CALLED EXCEPTIONS NUMBERS 1 AND 48.

These so-called exceptions ought not to be considered by the Court because there is no law or practice justifying the manner of their presentation. The manner of presentation is not according to the course of the common law. The Court therefore cannot rightly take any notice of them. The only way that a fact tried by a jury can be re-examined upon a writ of error in a Court of the United States is for errors of the Court based upon exceptions taken in the Court below and duly placed upon the record by the allowance of a bill of exceptions by the judge who tried the cause.

The leading case is Pomeroy's Lessees v. The State Bank of Indiana, 1 Wall., 592, 597-604. The syllabus is as follows:

"No exception lies to overruling a motion for a new trial, nor for entering judgment."

"The entries on a judge's minutes, the memoranda of "an exception taken, are not themselves bills of excep- "tions, but are only evidences of the parties right sea- "sonable to demand a bill of exceptions. No exception "not reduced to writing and sealed by the judge is a bill "of exceptions, and within the rules and practice of the "Federal Courts."

"Where an objection is to the ruling of the Court, it "is indispensable that the ruling should be stated, and "that it should also be alleged that the party then and "there excepted."

In that case, as in this, counsel resorted to the minutes but the Court disposed of the minutes with the following observation:

"He insists that he did so, because it is so stated in "the minutes of the case as appears in the transcript, "but the insuperable difficulty in supporting that propo- "sition is, that nothing of the kind appears in the bill of "exceptions." 1 Wall., 598.

At page 603 the Court says:

"Having come to the conclusion that the paper in the "transcript is not a good bill of exceptions, agreed state- "ment of facts, or a special verdict, the result is that it is "not a part of the record and must be wholly disre- "garded by the Court in determining whether the judg- "ment of the Court below ought to be reversed or "affirmed." 1 Wall., 603.

See also, Balt. R. R. Co. v. Trustees, 91 U. S., 130-131.

The Court in the latter case observes:

"Sufficient has already been remarked to show that "the affidavits constituting the whole basis of the theory "of fact involved in the errors assigned, effecting the "merits of the controversy, are no part of the record; "and consequently the errors assigned are entirely des- "titute of any legal foundation." 91 U. S., 131.

But if the alleged exceptions can be considered there is no error in the rulings.

We were entitled to a jury not because of any provision in the constitution restraining Congress from denying us the right to one, but because the Supreme Court has held that we were entitled to a jury in construing the very Statute that this proceeding was instituted under, viz., the act of August 1st, 1888; c. 728. (25 Stat. 357.) (See the reference thereto in the charge of the Court, Record 712.)

Chappell v. United States, 160 U. S., 499-513.

The opinion states the law as follows:

"**The general rule, as expressed in the Revised Stat- "utes of the United States, is that the trial of issues of "fact in actions at law, both in the District Court, and "in the Circuit Court, 'Shall be by jury,' by which is evi- "dently meant a trial by an ordinary jury at the bar of "the Court.** (Revised Statutes, secs. 566, 648.) Congress "has not itself provided any particular mode of trial in "proceedings for the condemnation of lands for public "uses. The direction in the act of 1889, c. 728, sec. 2, that "such proceedings shall conform, 'as near as may be to "those in the courts of record in the States,' is not to

" be construed as creating an exception to the general " rule of trial by an ordinary jury in a Court of record, " and as requiring, by way either of preliminary, or of " substitute, a trial by a different jury, not in a Court of " record, nor in the presence of any judge. Such a con- " struction would unnecessarily and unwisely encumber " the administration of justice in the Courts of the " United States. (Indianapolis and St. Louis Railroad v. " Horst, 93 U. S., 291, 301; Southern Pacific Co. v. Den- " ton, 146 U. S., 202, 209; Mexican Central Railway v. " Pinkney, 149 U. S., 206, 207.) This plaintiff in error had " the benefit of a trial by an ordinary jury at the bar of " the District Court on the question of the damages sus- " tained by him; and he was not entitled to a second trial " by jury, except at the discretion of that Court, or upon " a reversal of its judgment for error in law."

Not only is this so but an examination of the Civil Laws of the Hawaiian Islands, 1897, Chapter 99, which was also referred to frequently by the Court and counsel for plaintiff in the Court below, and relied on here, will show that it was intended by the local law that the issue of compensation should be tried as an ordinary action at law.

It is provided (page 595) that,

" the *Circuit Courts* shall have power to try and determine " all *actions* arising under this act, subject only to an ap- " peal to the Supreme Court in accordance with law."

There is nothing further upon the subject of how the compensation shall be determined. On page 596 it is provided that " the Court shall determine all adverse or con- " flicting claims to the property sought to be condemned

" and to the compensation or damages to be awarded for " the taking of the same."

The last section provides that, " where not expressly " provided in this act, the procedure shall be the same as " in other civil actions."

The chapter on civil procedure in courts of record provides first for the commencement of civil actions by petition.

Ballou's Civil Laws, Section 1215, page 483.

Section 1223 found on page 486 of said " Civil Laws " provides for the appearance of defendant and two forms of pleading by him; the first being in the nature of a demurrer and forming " an *issue of law* to be determined *by the Court* ",—the other forming " an *issue of fact* to be determined *by the jury.*"

There can be no doubt on an examination of the local laws that it was contemplated that a jury should pass on the question of compensation. The idea of jury trial will be found an inherent feature of all proceedings in the *Circuit Courts.* All other proceedings are before Circuit *Judges* at Chambers.

See page 457 of the chapter on *Circuit Courts and Circuit Judges,* and particularly Section 1144 defining the jurisdiction of Circuit *Courts* and Section 1145 defining the jurisdiction of Circuit *Judges.* Ballou's Civil Laws, 1897, pages 467, 458.

THE MOTION FOR A NEW TRIAL.

As to the so-called exception No. 48, it is clear that if the Court did not altogether refuse to exercise its dis-

cretion the decision cannot be ~~reversed~~ reviewed. It has been so often so held that the Supreme Court now manifests impatience when the point is referred to. But counsel says he relies on the authority of Felton v. Spiro, 78 Fed., 576, where a cause was sent back to a trial court to exercise its discretion where the judge *expressly* refused to do so and expressed the opinion that he would be "very glad indeed" when the Circuit Court of Appeals for that Circuit should have occasion to pass judgment upon the question of the *power* of the trial court to set aside a verdict because it was in the judgment of the Court against the weight of the evidence. 78 Fed., 580-581.

Now it will be presumed that Judge Estee had Spiro v. Felton called to his attention. Counsel says, in his affidavit, that he embodied it in his supplemental bill of exceptions, but even if he did not it is perfectly clear that Judge Estee was in full accord with the view that the Circuit Court of Appeals of the Sixth Circuit took of the matter.

Note his language:

"And while *it seems to be well settled* that under the law, "the Court *can* again set the verdict aside and grant a "new trial upon the same terms as in the former trial "*if in its discretion* it *sees fit*, to do so, yet the consensus of "the best judgment of the courts as found in the deci-"sions is, that where no rule of law has been violat-"ed, the Court *will* not, after two concurring verdicts, "grant a new trial if the questions to be tried depend "wholly on matters of fact; although the verdict is, in "the judgment of the Court, against the weight of the "evidence. (Joyce v. Charleston Ice Manufacturing Co.,

"50 Fed., 371-5; Clark v. Barney Dumping Co., 109 Fed., "235.)" (Record 774-775.)

It is respectfully submitted that there is no error in the record and that the government had the full benefit of every legal proposition in any way bearing upon the case.

HATCH & SILLIMAN,
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